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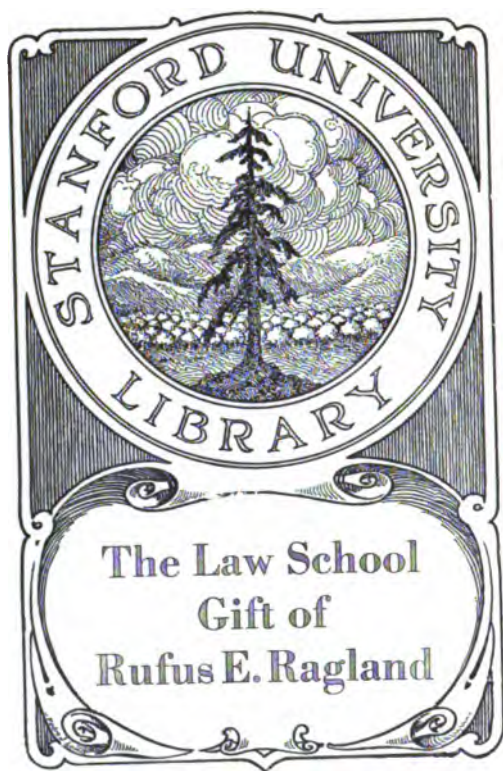
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PART
IV.

Competency.

that persons who have formerly executed offices in a corporation are produced to prove what they did when they were in office, and what has been usually done in their time, although in all such cases these officers have been liable to be punished by information, for their unlawful acts, the statute of limitations not extending to informations *quo warranto*, and yet such witnesses have been always allowed as the best evidence. In the same case Lord Hardwicke seemed also to consider that such testimony was also admissible on the ground of *necessity*; he observes, "Wherever any unlawful act is done in a corporate assembly, the whole assembly is liable to be punished by informations, and yet the persons who were present at such assemblies are always allowed to be good witnesses, and if they were not allowed there would be no evidence as to such acts at all" (1).

kins and Pascho Hoskins were called to prove the custom, but their testimony was rejected, on the ground that they were called to support a custom which they were concerned in interest to maintain. A new trial was afterwards granted, on the ground that these witnesses had been improperly rejected. Ld. Hardwicke, in delivering the judgment of the Court, stated, that as to the objection, that James Pascho derived his own authority from the custom, the answer was, that his authority was ended; his claim was not that of an office or franchise, but a bare authority, for he was only an elisor chosen by the corporation for the purpose of returning a jury to choose a mayor, and that is not an office, but an authority, constituted for a particular purpose; and that as to the second objection, which was the most material one, that he was liable to be punished for a wrong exercise of his power, the objection went rather to credit than competency; and his Lordship said, that he did not know of any case in which it had been held that a man was an incompetent witness because he was possibly liable to be punished in an information in nature of a *quo warranto*, for a past act, the lawfulness of which he may probably support by the testimony he is about to give in another action to which he is not a party.

(1) It may be doubted whether the reasons alleged in support of this decision be strictly sufficient to warrant it in principle, without resorting to the plea of necessity. His Lordship referred to the case in Roll. Ab. 685. pl. 3. 2 Hale, 280. Where three defendants in three several actions for perjury in the same suit in Chancery, were held to be competent witnesses for each other. But there the verdict for one would be no evidence in favour of another, whereas the very gist of the objection in the principal case is, that the record of the action would be evidence for the witness himself to protect him from punishment. It is difficult to distinguish the case in principle from that of indictments against a principal and accessory in case of felony. The accessory would not be a competent witness for the former, inasmuch as the record of conviction would be evidence against himself, and a record of acquittal would conclusively discharge him. The case cited by his Lordship (*Champion*

RAPE.

A judgment of ouster against one corporation has already been seen, evidence against * claims his title through the former (m). In however, the effect of the judgment may be proof of fraud or neglect (n).

Corporation books being of a public nature, they are admissible in evidence (o); consequently, the Court will not enforce the production of the books unless an inspection be necessary, on the ground of erasure, new entry, or other circumstance, when an inspection of the original is necessary (p). Upon a rule to show cause, will grant a rule for the production of books belonging to a corporation (q).

* RAPE.

Assuming it to be necessary to prove both *corporis et emissio seminis* (a), the latter fact may be proved by means of presumptive evidence.

v. *Atkinson*, 3 Keb. 90; *supra*, 745), where the steward was held to be a competent witness to prove a fine on the death of the lord, although the estate action might render a readmission necessary, and a fee, seems to have proceeded on the ground that the interest was but contingent.

(m) *Supra*, Vol. I. p. 193. 240. *R. v. Hebden*, 2 N. P. 1069; where, on a *quo warranto* to try the defendant to be a bailiff of Scarborough, in setting out his own election under Batty and Armstrong, two alleging, that at the time of his election they were the issues was taken on the allegation that they were onus of proof lying on the defendant, he gave general issue to prove their title; and on the other hand, the production of the custom of the borough of electing bailiffs, and a record, whereby judgment of ouster was given against Armstrong; this evidence was admitted, notwithstanding objection taken that this was *res inter alios acta*; and a new trial, after a verdict for the crown, that the evidence had been properly admitted; it (it was said) makes title under, and takes upon him his election, and therefore ought to be bound by what transacted by them.

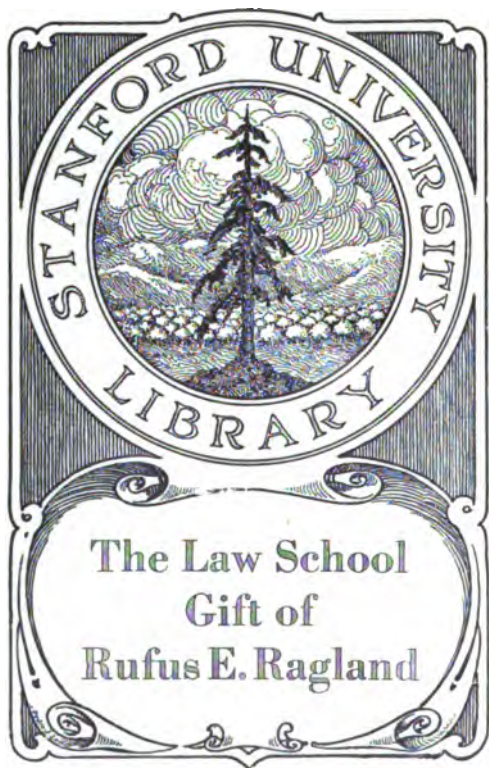
(n) *Ib.* and *R. v. Grimes*, 5 Burr. 2598. *R. v. T. R.* 72.

(o) B. N. P. 210. *R. v. Babb*, 3 T. R. 579.

(p) *Ibid.*

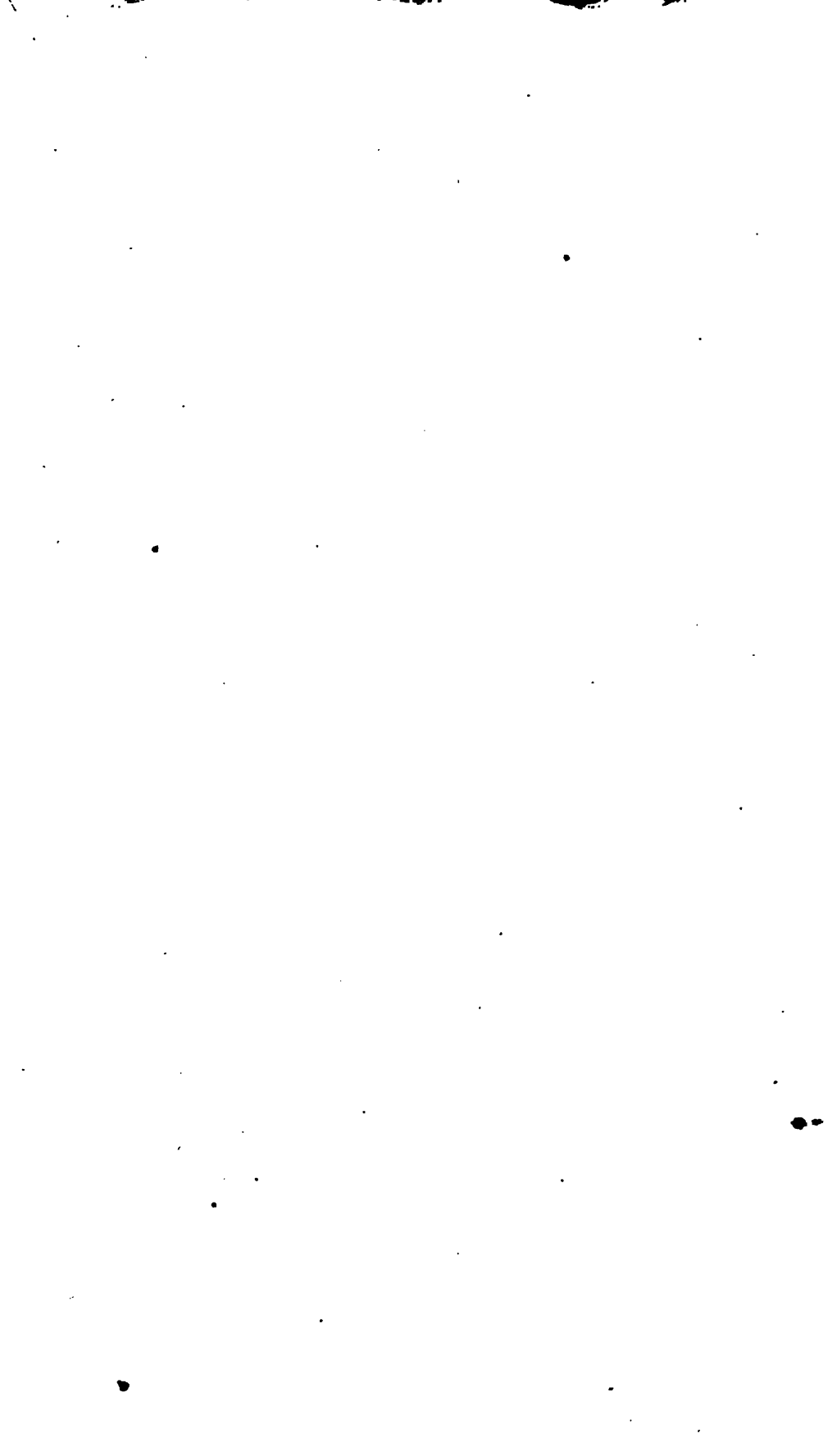
(q) *Brocas v. Mayor, &c. of London*, 1 Str. 307.

(a) For the conflicting decisions on the subject see 434. [*The State v. Le Blanc*, 1 Const. Rep. 354. *Sullivan*, Addison's Rep. 143.]

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A
PRACTICAL TREATISE

ON

The Law of Evidence,

&c.

VOLUME III.

PRACTICAL TREATISE
ON
The Law of Evidence,
AND
DIGEST OF PROOFS,
IN
Civil and Criminal Proceedings.

By **THOMAS STARKIE, Esq.**
OF THE INNER TEMPLE, BARRISTER AT LAW;
DOWING PROFESSOR OF COMMON LAW IN THE UNIVERSITY OF
CAMBRIDGE.

WITH REFERENCES TO AMERICAN DECISIONS, .
By **THERON METCALF.**

VOLUME III.

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A Practical Treatise on the Law of Evidence, and Digest of Proof, in Civil and Criminal Proceedings. By THOMAS STANBIE, Esq., of the Inner Temple, Barrister at Law; Downing Professor of Common Law in the University of Cambridge. With References to American Decisions, by THOMAS MITCHELL.

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JNO. W. DAVIS.

Clerk of the District of Massachusetts.

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Law of Evidence.

PART IV.—Continued.

NUISANCE.

UNDER the present title, the evidence relating to some torts or nuisances to persons or personal property, and 2dly, to real property, will be considered, which are unconnected with any immediate contract, but which do not amount to trespasses, the damage being purely consequential. In an action for a wrongful act, or nuisance to his person, or personal property, the plaintiff must prove, 1st, a wrongful act or omission; 2dly, by the defendant; 3dly, the consequential damage to his own person or property (o).

PART
IV.

First. The rule of common law is that of the civil law, *sic utere tuo ut alienum non ledas*; and an action is maintainable to recover damages for any injury resulting to the person or property of the plaintiff, from the carelessness and negligence of the defendant, or of his agent, in the use or management of his own property (i).

Proof of the
nuisance.

(o) A gratuitous bailee of a horse may maintain an action for negligence in not repairing a fence, which the defendant is bound to repair, by means of which the horse is injured. *Rooth v. Wilson*, 1 B. & A. 59.

(i) As if he exercises unruly horses in an improper place (*Michael v. Alstree*, 2 Lev. 172), or intrust a dangerous instrument, such as a loaded gun, to an indiscreet agent (*Dixon v. Bell*, 1 Starkie's C. 287; 5 M. & S. 198.) or where his barge having been sunk by accident in a navigable river, he neglects to give proper notice of the fact, as by placing a buoy over the spot (*Harmond v. Pearson*, 1 Camp. 517); or the occupier of a house neglects to fence in a dangerous area, although it has immemorially remained open (*Cou-*

PART
IV.Nuisance.
Mischievous
animal.

- * The evidence in an action for the negligent keeping of an animal, which has, in consequence, occasioned damage to the plaintiff, must of course be governed by the pleadings. If the declaration allege that the defendant *knew* that his dog, or other animal, was accustomed to bite *sheep*, or to bite *mankind*, the allegation must be proved, although the action might have been sustained without that averment (*k*). If it be alleged that the defendant knew that the dog was accustomed to bite sheep, it is not enough to show that it had attempted to bite a man (*l*). Where the declaration alleged that the dog was accustomed to bite mankind, proof that the defendant had warned the witness to beware of the dog, lest he should be bitten, was held to be *prima facie* evidence of the allegation to be left to the jury (*m*); although mere proof that the dog was fierce, and
- * 981 usually tied up, and * that the defendant afterwards pro-

pland v. Hardingham, 3 Camp. 396). A corporate body intrusted with a power from the exercise of which mischief may result to the public, are bound to use the greatest caution (*Weld v. Gas Light Company*, 1 Starkie's C. 189). So if a person place dangerous traps in his own ground, baited with flesh, so near to the highway, or to the grounds of another, that dogs passing along the highway, or kept in his neighbours' grounds, are likely to be attracted, and the plaintiff's dogs are in consequence injured. *Townsend v. Walten*, 9 East, 277. See *Ilott v. Wilkes*, 3 B. & A. 304. See the case of *Dean v. Clayton*, 1 Moore, 203; 2 Marsh. 577; 7 Taunt. 489. The defendant had placed sharp spears in his premises in such a manner that a hare would run under them, but a dog pursuing a hare would be wounded, and there were several public foot-paths through the defendant's woodland not fenced off, and on the outside of the woodland notices were painted that dog-spikes were set therein; a hare was started by the plaintiff's dog in the land of J. T. which adjoined the defendant's woodland, in which land of J. T. the plaintiff had liberty to sport; the dog started a hare in the land of J. T. and pursued it, the plaintiff using every means in his power to prevent such pursuit into the woodland of the defendant, and ran against a spike and was killed. The judges of the Court of Common Pleas were equally divided on the question, whether an action was maintainable. In the later case of *Ilott v. Wilkes*, 3 B. & A. 304, for setting spring-guns on the defendant's lands, and negligently leaving them there, whereby the plaintiff (a trespasser) was injured, it was held to be a good defence to show that the plaintiff had notice that the guns were set there.

(*k*) *Hartley v. Halliwell*, 2 Starkie's C. 211; 1 B. & A. 620. And see *Judge v. Cox*, 1 Starkie's C. 285. It seems that the owner of a fierce and unruly dog is bound to secure him without notice (*ibid.* and *Jones v. Perry*, 2 Esp. C. 482); and common report that a dog is mad renders it incumbent on the owner to confine him. *Ibid.*

(*l*) *Ibid.* But where a dog accustomed to worry sheep was left at large, and bit a horse, the owner was held to be liable. 1 Ld. Raym. 110.

(*m*) *Judge v. Cox*, 1 Starkie's C. 285.

mitted to make some compensation, has been held to be insufficient (n). It must also be proved that the owner knew the propensity of the animal (o).

PART
IV.

It is no answer to the action, where the defendant knew the vicious propensity of the animal, to prove that the party injured was himself guilty of some imprudence or negligence in the transaction; as that the plaintiff trod upon the defendant's dog whilst it was lying at his door, the defendant being aware that the dog was accustomed to bite (p). And where the owner, knowing that his dog had been bitten by another dog which was mad, instead of destroying the animal, as it was his duty to have done, as soon as he knew him to be in danger of so dreadful a malady, fastened him up, and the child of the plaintiff coming near the dog, irritated him with a stick, upon which the dog flew at him and bit him, and the child in consequence died of hydrophobia, it was held that the plaintiff might recover from the owner of the dog the expenses of the apothecary (q).

Scienter.

In an action against the owner or driver of a stage-coach for negligence, it is not sufficient merely to show that if he had kept the left side of the road the accident would not have happened; for where there is no other carriage on the road a coachman may drive on any part of it (r). Nor is he bound to keep to the left side of the road, provided he leave sufficient room for other carriages which meet him on their proper side (s). * But where he may adopt * 982 either of two courses, one of which is safe, the other hazardous, he adopts the latter at his peril (t), even although he drives on his own side of the road (u).

Proof of negligence.

If in an action on the case for negligent driving, or steering, it turn out that the injury was occasioned wilfully, the action cannot be maintained; trespass is the proper remedy (x). But if it be occasioned by the negligence of the

When occasioned wilfully.

(n) *Beck v. Dyson*, 4 Camp. 198.

(o) *Ibid.* and 12 Mod. 555.

(p) *Smith v. Pelah*, 2 Str. 1264.

(q) *Jones v. Perry*, 2 Esp. C. 482. See the cases on this subject, *Mason v. Keeling*, 12 Mod. 322; 1 Ld. Raym. 606. *Baynsham v. Sharp*, 1 Lutw. 90. *Buzendin v. Sharp*, 2 Salk. 662.

(r) *Aston v. Heaven*, 2 Esp. C. 533. See also *Wade v. Lady Carr*, 2 D. & R. 255.

(s) *Wordsworth v. Willan*, 5 Esp. C. 273.

(t) *Jackson v. Tollett*, 2 Starkie's C. 37.

(u) *Mayhew v. Boyce*, 1 Starkie's C. 423. Vide *supra*, 345.

(x) *Dog v. Edwards*, 5 T. R. 648, on demurrer. *Savignae v.*

PART
IV.By the defend-
ant's agent.

driver of the carriage, or pilot of the vessel of the defendant, although he himself be present, the proper remedy is by action on the case (y).

Secondly. Where the action is brought against the defendant for the negligence of his agent, it is necessary to prove not merely that the servant, or other person whose negligence occasioned the damage, was the servant of the defendant, but also that the mischief was occasioned in the transaction of the business of the master, for the latter is not responsible for any substantive *tort* committed by the agent whom he employs, unconnected with the employment and authority delegated to him. It seems to be sufficient to show that the agent was engaged in driving the carriage, or steering the ship, of his principal, or in the performance of any other duty in which agents are usually employed (z). Such evidence however is not conclusive; for if a servant were to take a horse out of a stable in defiance * of his master's orders, the latter would not be responsible for the mischief which ensued (a), any more than he would be for any other act of the servant done of his own authority, and without the assent of the master (b). And in general, if a servant being ordered to do a lawful act, exceed his authority, and thereby commit an injury, the master is not liable (c). An averment, that the injury was occasioned by the negligent act of the master, will be supported by evidence that it was occasioned by the negligent act of the servant (d), as in an action for the negligent driving of the defendant's cart.

Where there is an intermediate agent, or more than one, the maxim of law is *respondeat superior*; and the action ought to be brought either against the very party who

* 983

Negligence by
an agent.

Roome, 6 T. R. 125, in arrest of judgment, *Tripe v. Potter*, cited 6 T. R. 128. *Ogle v. Barnes*, 8 T. R. 188. *Kingston v. Booth*, Skinn. 228. *Middleton v. Fowler*, 1 Salk. 282. *Boucher v. Noidstrom*, 1 Taunt. 568. *MacManus v. Crickett*, 1 East, 106.

(y) *Huggett v. Montgomery*, 2 N. R. 446. 2 H. B. 443.

(z) In *Michael v. Alestree*, 2 Lev. 172, it was held, that an action was maintainable against the master for damage done by his servant in exercising his horses in an improper place, though he was absent; because it should be intended that the master sent the servant to exercise horses there.

(a) See the observations of Buller, J. 3 T. R. 762.

(b) See *Macmanus v. Crickett*, 1 East, 106. *Boucher v. Noidstrom*, 1 Taunt. 568.

(c) *Kingston v. Booth*, Skinn. 228. *Middleton v. Fowler*, 1 Salk. 282.

(d) *Brucker v. Fromont*, 6 T. R. 659.

committed the injury, or against the principal (e). Thus, where *A.* the owner of a house which he had never occupied, contracted with *B.* to repair it, and *B.* contracted with *C.* to do the work, and *C.* with *D.* to furnish the materials, and the servant of *C.* placed a quantity of lime on the public road adjoining the house, in consequence of which the plaintiff's carriage was overturned, it was held that *A.* the owner was liable for the damage sustained (f). So where the owner of *a house demised by lease, covenanted to repair it, and employed workmen for that purpose, the landlord, and not the tenant, was held to be liable for a nuisance in the house occasioned by the negligence of the workmen (g). The principle of responsibility is, that the agent is the mere instrument of the defendant, and that it is incumbent upon him to select an agent of competent skill and ability, and to exercise a controul and authority over him, in order that others may not be injured (h). Hence, where the supposed agent acts under a paramount authority, and not under that of the supposed principal, the latter is not responsible. It was held that the captain of a sloop of war was not answerable for damage done in running down a vessel, the mischief occurring during the watch of the lieutenant, and whilst he had the actual management of the vessel by virtue of his office and duty as lieutenant, and so acted independently of any authority from the captain (i). But a pilot steering a ship is liable for damages occasioned by his misconduct, although a superior officer be on board (k).

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IV.

Negligence by
an agent.

* 984

(e) See *Stone v. Cartwright*, 6 T. R. 411. Per *Ld. Kenyon*, *Bush v. Steinman*, 1 B. & P. 404. *Hern v. Nichols*, 1 Salk. 289. *Jones v. Hart*, 2 Salk. 441. 1 Bl. Comm. 431. Inst. Lib. 4. tit. 5. s. 1. Dig. Lib. 9. tit. 3. *Littledale v. Lord Lonsdale*, 2 H. B. 267. 299.

(f) *Bush v. Steinman*, 1 B. & P. 404. *Matthews v. West London Waterworks*, 3 Camp. 403. And see *Flower v. Adam*, 2 Taunt. 314. [*Sly v. Edgley*, 6 Esp. C. 6.]

(g) *Leslie v. Pounds*, 4 Taunt. 649.

(h) 1 Bl. Comm. 431. Where a man intrusted a loaded gun to a young mulatto girl, and mischief resulted from the accidental discharge of the instrument in her hands, he was held to be responsible, *Dixon v. Bell*, 1 Starkie's C. 287. [S. C. 5 M. & S. 198.]

(i) *Nicholson v. Mounsey*, 15 East, 384. [See *Bussy v. Donaldson*, 4 Dallas, 206. *Snell v. Rich*, 1 Johns. 305.]

(k) *Stort v. Clements*, Peake's C. 107. *Huggett v. Montgomery*, 2 N. R. 446. And see *Lane v. Cotton*, 12 Mod. 472. 477; 11 Mod. 13; 5 Mod. 455; Carth. 487; 1 Salk. 17; 1 Ld. Raym. 650; where three of the judges, contrary to the opinion of *Holt, C. J.* held that the postmasters were not liable for the loss of exchequer bills lost by the default of clerks in office. [See *Bolan v. Williamson*, 2 Bay,

PART
IV.Against an occupier, &c.
* 985

Proof of damage.

In an action against the defendant for not repairing his fences, it is necessary, in addition to evidence of the obligation to repair, and of the damage which has * resulted from the neglect, to prove that the defendant is the *occupier* of the estate liable to the repair (l). But where the owner of a house is bound to repair it, he, and not the occupier, is liable for the damage occasioned by the neglect to repair (m).

Thirdly. It must be shown that *damage* resulted to the plaintiff, as alleged in the declaration, from the act or omission of the defendant (n).

Where a public nuisance has been committed by the defendant, as by obstructing the king's highway, the plaintiff cannot support a private action without proving, as alleged in the declaration, that he has sustained some special and particular damage beyond that which is suffered by other subjects (o); as by a hurt to himself or his horse, from falling into a trench cut in a public highway (p).

Where the defendant had re-moored his barge across a public navigable creek, by means of which the plaintiff, who was navigating along the creek, was forced to unload his barge, and carry his goods inland at a considerable expense, it was held to be a special damage, sufficient to sup-

551. *Maxwell v. M'Ivey*, 2 Bibb, 211.] As to the personal responsibility of officers, see *Macheath v. Haldimand*, 1 T. R. 172. *Unwin v. Wolsely*, ib. 674. *Vide infra*, tit. *Trespass*. In an action against A. & B. for obstructing lights, it is sufficient to show that the latter, though but a mere agent, superintended the work and gave directions. *Wilson v. Peto*, 6 Moore, 47.

Where engineers were employed by the defendant to erect a steam-engine on the defendant's premises, which adjoined to the plaintiff's, and the engine exploded through the mismanagement of the defendant's servant, the engineer being present, the action was held to be maintainable. *Wills v. Hague*, 2 D. & R. 33.

The master of a ship is responsible for the acts of his crew, although they act under the direction of a pilot taken on board according to the direction of the statute. *Boucher v. Noidstrom*, 1 Taunt. 568.

(l) *Cheetham v. Hampson*, 4 T. R. 318.

(m) *Payne v. Rogers*, 2 H. B. 349.

(n) *Supra*, tit. *Case*, p. 359; tit. *Label*, p. 871.

(o) 1 Inst. 56. *Hubert v. Grove*, 1 Esp. C. 148. *Iveson v. Moore*, 1 Ld. Raym. 486. 12 Mod. 262. *Willes*, 74, n. It is said that the mere obstruction of the plaintiff's business, by merely delaying him on the road for a short time, will not support an action, the injury being but consequential. *P. C. Paine v. Partrick*, Carth. 191.

(p) Carth. 191. [See *Harrison v. Sterret*, 4 Har. & M'Hen. 540. *Dunn v. Stone*, 2 Car. Law Repos. 261. *Hughes v. Heiser*, 1 Binney, 463.]

port the action (q). So where the plaintiff was obliged, in consequence of an obstruction of a public road, to carry his tithes by a longer and more inconvenient way (r). In such an action the proximate * cause of the mischief should be stated in the declaration; and if the remote cause alone be alleged, it will not be competent to the plaintiff to give the intermediate causes in evidence (s).

PART
IV.

* 986
Proof of damage.

In an action for an injury occasioned by the negligence of another, it is a good defence to show that the injury, so far arose from the negligence of the plaintiff himself, that he might, by ordinary care and caution, have avoided the injury. Thus, one who is injured by riding against an obstruction in a public highway cannot recover damages if it appear that he was riding violently, and without ordinary care; and that with due care he might have seen and avoided the obstruction (t). And although the defendant's negligence be the primary cause of consequential injury to the plaintiff, yet if the proximate and immediate cause be the unskilfulness of the plaintiff, it seems that the latter will not be entitled to recover (u). As where A. placed rubbish in the highway, and the dust blown from it frightened the horse of B. which carried him nearly in contact with a waggon, to avoid which B. unskilfully rode over other rubbish, and was overthrown and hurt (x). But where, in consequence of unskilful driving, a stage-coach was likely to be overturned, and an outside passenger, with a view to his own safety, jumped off, and his leg was broken, it was left to the jury to say whether he did this rashly, and * without sufficient cause, or from a reasonable apprehension of danger (y).

Evidence in defence.

* 987

(q) *Rose v. Miles*, 4 M. & S. 101.

(r) *Hart v. Bassett*, T. Jones, 156. The court said that the plaintiff had sustained a particular damage; for the labour and pains which he had been forced to take with his cattle and servants, by reason of this obstruction, might be of more value than the loss of a horse, which was sufficient to support an action. See also *Chichester v. Lethbridge*, Willes, 73. [See Comyns's Rep. 60.]

(s) *Fitzsimmons v. Inglis*, 5 Taunt. 534.

(t) *Butterfield v. Forrester*, 11 East, 60.

(u) 2 Taunt. 314.

(x) *Floater v. Adam*, 2 Taunt. 314. See *Sutton v. Clarke*, 6 Taunt. 29; and tit. *Malice*. [See also *Steele v. Inland Western Lock Navigation Company*, 2 Johns. 263. *Town of Lebanon v. Olcott*, 1 N. Hamp. Rep. 339.]

(y) *Jones v. Boyce*, 1 Starkie's C. 493. Cor. Ld. *Ellenborough*, C. J. the jury found for the plaintiff, damages 400l.

PART
IV.* 989
Proof of pos-
session, &c.

In an action for a nuisance to the plaintiff's real property (z), he must prove, 1st, his possession (a) * of the house or land, or his reversionary interest (b), or if an incorporeal right be affected, his title to it (c). 2dly. The act of nuisance done by the defendant. 3dly. The damage resulting to the plaintiff's right (1).

(z) In general, case lies for an injury to the house or land of another, as for building a house which overhangs the land of another, and causes the rain to fall upon it and injure it. (See *Penruddock's* case, 5 Co. 100. *Bowry v. Pope*, 1 Leon. 168. Cro. Eliz. 118.) So for any injury to lands or houses which renders them useless, or even uncomfortable for the purposes of habitation, an action lies; as for the erection and use of a smith's forge (*Bradley v. Gill*, Lutw. 69); a privy (*Styan v. Hutchinson*, Cor. Ld. Kenyon, Sitt. after Mich. 40 Geo. III. cited 2 Selw. N. P. 1047); a pig-stye (*Aldred's* case, 9 Co. 59); a lime-kiln (ibid. per Wray, C. J.) a tobacco-mill (*Jones v. Powell*, Hutt. 136). So for the corruption of water by drugs, by means of which water running through the plaintiff's premises is rendered less serviceable for the use of his cattle. MS. case.

It is otherwise where the defendant's act is attended simply with inconvenience to the plaintiff; as where he merely cuts off a prospect from the house by building a wall, but does not exclude the light (*Knowles v. Richardson*, 1 Mod. 55; 9 Co. 58); or by opening a new window disturbs the privacy of the plaintiff (per Eyre, C. J. cited by Le Blanc, J. 3 Camp. 82). The only remedy in such a case is to obstruct the window by a wall built on the plaintiff's premises. In *Street v. Tugwell* (41 Geo. III. cited 2 Selw. N. P. 1047), an action was brought for keeping a number of pointers so near the plaintiff's house that his family were disturbed in the enjoyment of it, and prevented from sleeping during the night; and the jury found for the defendant, although he adduced no evidence. A new trial is said to have been refused; and yet it seems to be difficult to distinguish between a nuisance occasioned by the establishing a dog-kennel near a man's house, and the use of a forge or mill.

An action will also lie against the proprietor of tithes for not removing them from the soil within a reasonable time (8 T. R. 72), provided the tithe has been duly set out, the wheat in the sheaf (*Shallcross v. Jowle*, 13 East, 261), and hay in the cock, after being telled. *Mayes v. Willett*, 3 Esp. C. 31. *Newman v. Morgan*, 10 East, 5. *Blaney v. Whitaker*, 23 Geo. III. cited ibid. *Hallwell v. Trappes*, 2 Taunt. 55. *Infra*, 992.

(a) If a prescriptive right be alleged, such right must be proved. (See tit. *Prescription*.) But although it was formerly held to be necessary to allege a right by prescription (*Bowry v. Pope*, 1 Leon. 168. Cro. Eliz. 118), it is now settled that a general averment of a right, as incident to the plaintiff's possession of house or land, is sufficient. *Supra*, tit. *Disturbance*; and see the cases cited *infra*, note (i).

(b) *Vide* tit. *Reversion*.

(c) *Supra*, tit. *Disturbance*.

(1) [Where one built a house on his own land, within two feet

All actions for nuisances affecting real property, whether corporeal or incorporeal, are local in their nature, and must be proved to have been committed within the county in which the action is brought (*d*). But in general, unless the declaration contain a precise local description of the nuisance, the local situation will be ascribed to *venue*, and will not require precise proof (*e*). Where a declaration for damaging the plaintiff's wharf alleged that it was situated near the river Thames, to wit, at Kingston, in the parish of St. Saviour, Southwark, in the county of Surrey, and it appeared in *evidence that there was no such place * 989 as Kingston in that parish, it was held that the description might be referred to *venue* (*f*).

The evidence to prove the right, as claimed, is either direct or presumptive; direct, as where there is an express grant of a right of way. So the title may arise by implication of law. Where, for instance, a man conveys land to another, which is inaccessible except through his own lands, he grants, by implication of law, such a way for the enjoyment of the land (*g*). So if a man, who has built a house on his land, sells the house, neither he, nor any one

Proof of an incorporeal right.

(*d*) *Mersey and Irwell Navigation v. Douglas*, 2 East, 497. Where no local description is alleged in an action for a nuisance, the property will be presumed to be situated in the county specified in the margin (*Warren v. Webb*, 1 Taunt. 379). An averment, that the defendant suffered a water-spout to be out of repair at *A*. in the county of *B*. was held to be an averment that it was situated there (*ibid*). The general rule is, that the *venue* in the margin may aid, but cannot hurt.

(*e*) *Hamer v. Raymond*, 5 Taunt. 789. 1 Marsh. 363, *supra*, 350; and see tit. *Variance*.—*Venue*.

(*f*) *Hamer v. Raymond*, 5 Taunt. 789. And see tit. *Penal Action*.

(*g*) Com. Dig. tit. *Chimin*. D. 3. Cro. Jac. 170. 6 Mod. 4. *Chichester v. Lethbridge*, Willes, 71. *Houton v. Frearson*, 8 T. R. 50.

of the boundary line, and seven years afterwards the adjoining owner dug so deep into his own land as to endanger the house, whereupon the owner of the house left it and took it down; it was held that no action would lie for damage to the house, but that the owner was entitled to damage for the falling of his natural soil into the excavation thus made. *Thurston v. Hancock*, 12 Mass. Rep. 220. A person who builds a house adjoining that of another, and sinks the foundation lower than that of his neighbour, is not liable for any consequential damage, if he have used due diligence to prevent injury to the other's house. *Panton v. Holland*, 17 Johns. 92. If a surveyor of highways dig down or raise a street, discretely and not wantonly, whereby a house contiguous thereto is endangered or injured, the owner has no remedy. *Callender v. Marsh*, 1 Pick. 418.]

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wrong, &c.

tinuance of it (q); but the plaintiff might in such case proceed against the sub-lessee (r). Where the damage has resulted from an omission by the defendant, as in neglecting to repair a public road, his obligation must be proved (s). Where an action is brought for neglecting to remove tithes, it seems that it is necessary to prove a notice to the defendant of their having been set out (t).

Where a house, in respect of which a nuisance has been committed, has been aliened, the alienee may maintain an action for the continuance of the nuisance, after request made to abate or remove the nuisance (u). And it should seem that proof of such request is unnecessary in order to enable the alienee to maintain an action against a wrong-doer, who is guilty of a continuing nuisance, by neglecting to remove it (1).

Damage, &c.

* 993

Thirdly. It is sufficient to prove, that by reason of the nuisance the plaintiff cannot enjoy his right in as full and ample a manner as formerly. In an action for obstructing lights, it is not necessary to prove a total privation; it is sufficient to show that the plaintiff * cannot, (in consequence of the obstruction,) enjoy it in as free and beneficial a manner as before (x).

Evidence of
damage.

As that the stream which flows through his land is diminished in quantity, or that its quality has been affected, and that it is less wholesome for cattle, or less fit for any other purpose to which it may have been applied. Proof of an abridgment of the means and power of exercising the

(q) *Rosewell v. Prior*, Salk. 460; *W. Jones*, 272; *Cro. Jac.* 373. 555. [See *Hughes v. Mung*, 3 Har. & M'Hen. 441. *Carruthers v. Tillman*, 1 Hayw. 501. *Anon. v. Deberry*, *ibid.* 248. *Staple v. Spring*, 10 Mass. Rep. 72.]

(r) *Ibid.* and *semble* against both, for one was but the agent of the other in doing the wrong.

(s) 1 Inst. 56. a. n. Hargr. Ed. The action will not lie where a parish or county is bound to repair a highway. *Russell v. Men of Devon*, 2 T. R. 671.

(t) 3 Burr. 1892. But the common law does not require notice to be given in general of the intention to set out tithes, either predial, or of animals. *Kemp v. Filewood*, 11 East, 358; 1 Roll. Ab. 643, tit. *Dismes*, x. pl. 1. *Body v. Johnson*, Somerset Summer Assizes, 1815. *Cor. Dampier*, J. cited 2 Sel. N. P. 1052. But a special custom may render such a notice necessary. *Butter v. Heathby*, 3 Burr. 1891.

(u) *Penruddock's case*, 5 Co. 101. a.

(x) *Cotterell v. Griffiths*, 4 Esp. C. 69. [See Mr. Howe's note to *Chandler v. Thompson*, 3 Camp. 82.]

(1) [*Quare de hoc.* See *Willes*, 583. *Jenk.* 260. pl. 57. 2 Chit. Pl. 333, note (c).]

right is sufficient, without evidence to show that any positive damage has resulted to the plaintiff. Thus, it is sufficient to prove an obstruction of a way to which the plaintiff is entitled over the defendant's land, without showing that any special damage has been occasioned by the obstruction (y).

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It is not only a good defence to show that the obstruction was erected by the leave and license of the plaintiff, but even where the license has subsequently been recalled, to show that the erection was made under a parol license from the plaintiff at the defendant's expense, the expenses not having been tendered to the defendant (z).

Proof in defence.

It was held to be no defence that the window in question was to be deemed a nuisance under the stat. 14 G. 3. c. 78, having been built upon a party-wall, no conviction having taken place (a).

* OFFICERS.

* 994

By the statute 23 Geo. III, c. 70, provisions very similar in their nature to those contained in the statute 24 Geo. II, c. 44, with respect to justices of the peace, &c. are enacted for the protection of excise officers (e); and by the

(y) *Allen v. Ormond*, 8 East, 4. Even although such way has been used by the public for more than twelve years. [See *Angell on Water-courses*, 50, & seq.]

(z) *Winter v. Brockwell*, 8 East, 308. The obstruction there was a sky-light over the defendant's area, which prevented the access of the light and air through a window to the plaintiff's dwelling-house. [See *Anon. v. Deberry*, 1 Hayw. 248.]

(a) *Titterton v. Conyers*, 1 Marsh. 140. [5 Taunt. 465. S. C.]

(e) By sec. 30, "No writ shall be sued out, or copy of process served, upon any officer of excise, or any person acting by his order and in his aid, for any thing done in the execution of or by reason of his office, until one calendar month next after notice in writing, shall have been delivered to him, or left at the usual place of his abode, by the attorney or agent for the party who intends to sue out such writ or process, in which notice shall be clearly and explicitly contained the cause of action, the name and place of abode of the person who is to bring the action, and the name and place of abode of the attorney or agent."—The notice must state the plaintiff's place of abode at the time of delivering the notice. Where the notice stated the plaintiff's place of abode at the time when the cause of action arose, but did not state his place of abode at the time when notice was given (which was five weeks after the injury,) the notice was held to be insufficient (*Williams v. Burgess*, 3 Taunt. 127). As to the description of the place of abode, *vide supra*, 795, and *Wood v. Folliott & others*, 3 B. & P. 552. n.

By sec. 31, the notice must be proved at the trial the defendant will be entitled to a verdict, and no evidence can be received.

By sec. 31 & 33, provisions similar to those contained in the stat.

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statute 23 Geo. III, c. 70, the provisions of the former act are extended to officers of the customs, and to those who act in their aid and assistance.

The action must be commenced within three months next after the cause of action shall arise, and the defendant may give special matter of defence in evidence under the general issue (b).

- * 995 By section 35 of the same statute, where any goods * liable to excise or inland duties are seized in pursuance of any act of parliament, or if any action shall be brought by the owner or claimer of any such goods, against any officer of the excise, or for inland duties, or against any person acting in their assistance, for any thing done in pursuance of any such act, the proof of payment of such duties shall lie upon the owner or claimer, and not on the officer or defendant.

The effect of judgments in cases of this description has been already considered (c).

PAROL EVIDENCE.

General principle.

THE great principle which regulates the admission or rejection of parol evidence in relation to written instruments has already been adverted to (d).

Where written instruments are appointed, either by the immediate authority of law, or by the compact of parties, to be the permanent repositories and testimonies of truth, it is a matter both of principle and of policy to exclude any inferior evidence from being used, either as a substitute for such instruments, or to contradict or alter them. Of *principle*, because such instruments are in their own nature and origin entitled to a much higher degree of credit than that which appertains to parol evidence; of *policy*, because it would be attended with great mischief and inconvenience if those instruments upon which men's rights depended were liable to be impeached, and contradicted by loose collateral evidence.

Consistently with the principles already adverted to, it is a general rule, that oral evidence shall in no case be re-

24 Geo. II. c. 44, are enacted, as to tender of amends, and payment of money into court.

(b) Sec. 34; and see the stat. 28 Geo. III. c. 27, s. 23. This was also allowed under previous acts of parliament. See *Wood v. Chesal*, 2 Bl. R. 1254.

(c) *Supra*, Part II. 227. 236

(d) *Supra*, Part III.

See 16.

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ceived as *equivalent* to, or as a *substitute* for, a written instrument, where the latter is required by law (e); * Or to give effect to a written instrument which is *defective* in any particular, which by law is essential to its validity (b); or to *contradict*, *alter*, or *vary* (c) a written instrument, either appointed by law, or by the compact of private parties, to be the appropriate and authentic memorial of the particular facts which it recites; for by doing so, oral testimony would be admitted in usurpation of a species of evidence decidedly superior in degree.

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IV.

General principle.
* 996

But parol evidence is *admissible* to *defeat* (d) a written instrument, on the ground of fraud, mistake, &c. or to *apply* it to its proper subject-matter (o), or in some instances as ancillary to such application, to *explain* the meaning of doubtful terms (f), or to *rebut* presumptions arising extrinsically. In these cases the parol evidence does not usurp the place or arrogate the authority of written evidence, but either shows that the instrument ought not to be allowed to operate *at all*, or is essential in order to give to the instrument its legal effect.

Inasmuch as the rejection of parol evidence, where it is placed in competition with written evidence, usually arises from the consideration that to admit it would be to allow the weaker evidence to usurp the place of the stronger, and to render the most solemn, authentic, and permanent instruments of evidence which the law can devise, uncertain, inoperative and ineffectual, the extent to which the principle operates, and the rules deducible from that principle, will, perhaps, be exhibited in the clearest point of view by reference to the different purposes for which parol testimony can be offered in relation to written instruments. Parol evidence, in general, may be offered for three purposes in relation to written evidence: * *First*, in *OPPOSITION* to written evidence, where it is offered with a view to *supersede* the use of written evidence, and to supply its place, or to *contradict* it, or to *vary* its effect, or wholly to *subvert* such evidence, by showing that it has no legal existence, or no legal operation in the particular case; or *secondly*, it is offered in *AID* of written evidence, in order either to *establish* a particular document, or to *apply* it to its proper subject-matter, or to *explain* it; or to rebut some *presumption* which affects it; or as secondary evidence where the

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Not admissible to supersede, &c. by supplying omissions.

(e) *Infra*, 997.

(b) *Infra*, 997.

(c) *Infra*, 1002, & seq.

(d) *Infra*, 1014.

(o) *Infra*, 1021.

(f) *Infra*, 1028.

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IV.Not admissible
to supersede,
&c.To supersede
written evi-
dence.By supplying
defect, &c.

original is unattainable (*f*) ; or *thirdly*, it is used as *original and INDEPENDENT* evidence to prove a particular fact, without regard to written evidence of the fact, not being excluded by any rule of law.

I. In the first place, parol evidence is never admissible to *supersede* the use of written evidence, where written proof is required by the law.

Where the law, for reasons of policy, requires written evidence, to admit oral testimony in its place would be to subvert the rule itself. The same principle applies where the law prescribes a certain form of written evidence ; to allow a defect in the instrument to be supplied by oral evidence would be, *pro tanto*, to dispense with the law. Hence, in general, where the law requires a formal written instrument (*g*), if the document offered in evidence be *defective*, so that it cannot operate without collateral aid, the defect cannot be supplied by oral testimony. Thus, if in a will the name of the intended devisee or legatee be omitted, or a blank be left for the description of the estate, or amount of the legacy, these omissions cannot be supplied by oral testimony as to the real intention * of the testator (*h*). And although different writings may, by internal reference, be connected together so as to constitute one entire instrument within the statute of Frauds, yet they cannot be connected by mere oral testimony (*i*), neither can any defect in the writing be supplied by oral evidence (*k*).

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In cases where a written document is not absolutely es-

(*f*) *Supra*, Vol. I. p. 328. 354.

(*g*) See the stat. of Frauds, *supra*, 602, 3, 4. 612.

(*h*) *Baylis v. Attorney General*, B. N. P. 298. 2 Atk. 240. *Wool-lam v. Hearn*, 7 Ves. 211. Where the testatrix made a disposition in favour of Lady —, and the will contained other provisions in favour of Lady Hort, and she was appointed a trustee in the will by the name of Dame Hort, Lord Thurlow held that the blank could not be supplied by parol evidence (*Hunt v. Hort*, 3 Bro. C. C. 311). In *Abbott v. Massey*, (3 Ves. 148,) where a legacy was given to Mrs. G.—Ld. Loughborough referred it to the master, to ascertain who Mrs. G. was, who was there described by an initial letter only ; but see Sir D. Evans's observations upon this case in his edition of Pothier, vol. ii. p. 204. See also *Baylis v. Attorney General*, 2 Atk. 239.

(*i*) *Supra*, 603. 612.

(*k*) *Supra*, 602. So an agreement, referring to such parts of another instrument as had been read by one party to another, is not sufficient within the statute, because it is imperfect without parol evidence ; but an instrument which is conformable to the statute may by reference include the contents of another which is not so. *Brodie v. St. Paul*, 1 Ves. jun. 326.

sential in point of law to give a legal operation to that which is to be proved, as it is in cases under the statute of Frauds and of Wills, yet if an authentic written memorial be constituted by law, parol evidence cannot, in general, be substituted for it; for being appointed by law for the purpose of evidence, it must be considered as the best evidence (h). Thus, in general, judgments and judicial proceedings must be proved by means of the record. The examination of a prisoner before a magistrate upon a charge of felony cannot be proved by parol unless it has been expressly * shown that the examination was not taken, as the statutes require, in writing (i).

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IV.

Not admissible
to supersede,
&c.

* 999

The same principle applies where private parties have by mutual compact constituted a written document the witness of their admissions and intentions (k).

To admit oral evidence as a substitute for instruments, to which, by reason of their superior authority and permanent qualities, an exclusive weight and authority is given by the solemn compact of the parties, would be to substitute the inferior for the superior degree of evidence; conjecture for fact; and presumption for the highest degree of legal authority; loose recollection, and uncertainty of memory, for the most sure and faithful memorials which human ingenuity can devise, or the law adopt—to introduce a dangerous laxity and uncertainty as to all titles to property, which, instead of depending on certain fixed and unalterable memorials, would thus be made to depend upon the frail memories of witnesses, and be perpetually liable to be impeached by fraudulent and corrupt practices. In short, the great advantages which are peculiar to written evidence would be, in a great measure, if not entirely, sacrificed (l).

Written con-
tracts.

As oral evidence is inadmissible for the purpose of * sup- * 1000
plying an omission in an instrument where written evidence

(h) *Supra*, Part III.

(i) *Supra*, 51.

(k) *Supra*, 81.

(l) See *Countess of Rutland's case*, 5 Co. 26. *Haynes v. Hare*, 1 H. B. 659. *Buckle v. Millerd*, 2 Vent. 107. *Clifton v. Walmesley*, 5 T. R. 564; 3 Atk. 8; 1 Wils. 34. *Mease v. Mease*, Cowp. 47. It would be inconvenient (observes Ld. Coke) that matters in writing, made by advice and on consideration, and which finally import the certain truth of the agreement of the parties should be controlled by an averment of parties, to be proved by the uncertain testimony of slippery memory; and it would be dangerous to purchasers, and all others in such cases, if such rude averments against matter in writing should be admitted. [See *Stackpole v. Arnold*, 11 Mass. Rep. 27.]

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Not admissible
to supersede,
&c. where the
instrument is
defective.

Apparent and
latent ambi-
guities.

is required by law, because, to admit it would virtually be to give to oral the superior force of written evidence, and occasion that to pass by parol, which by law ought not to pass but by writing, it is upon the same principle inadmissible to give any effect to a written instrument which is void in law for inconsistency, repugnancy, or ambiguity in its terms; for if a meaning could be assigned, by the aid of extrinsic evidence, to that which was apparently destitute of meaning, or if the same instrument could be made to operate in different ways, according to the weight of oral evidence, it is plain that the effect and result would depend, not upon the terms of the instrument, but upon the force and effect of the oral evidence, and thus the latter would virtually be substituted for the former. What degree of ambiguity and uncertainty will avoid a will, deed, or other instrument, is a question of law.

An important distinction has already been adverted to between ambiguities which are *apparent* on the face of an instrument, and those which arise merely extrinsically in the *application* of an instrument of clear and definite intrinsic meaning to doubtful subject-matter. An ambiguity, apparent on reading an instrument, is termed *ambiguitas patens*; that which arises merely upon its application, *ambiguitas latens*. The general rule of law is, that the latter species of ambiguity may be removed by means of parol evidence; the maxim being "*Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum, verificatione facti tollitur*" (n). On the other hand, it is a settled rule that such evidence is inadmissible to explain an ambiguity *apparent* on the face of the instrument.

* 1001 This distinction is an immediate result from the * general principles already specified. If an instrument which is in itself wholly devoid of meaning, according to the usual and ordinary rules of legal construction, or which is indefinite and ambiguous, and equally capable of several different constructions and applications, might have one particular definite meaning annexed to it by means of extrinsic oral evidence, it is plain that the oral evidence, and not the writing, would produce the definite effect. On the contrary, where the terms of the written instrument are clear, and oral evidence is used to point the application to this or that subject-matter, the oral evidence does not usurp the authority of the written instrument: it is the instrument which operates; the oral evidence does no more than assist its operation by pointing out and connecting it with

(n) See *Ld. Bacon's Reading on the statute of Uses*.

the proper subject-matter; it acts in aid and assistance of the written instrument, and performs that duty which on every application of a written instrument must be accomplished by means of extrinsic evidence, that is, it points out the precise object to which the instrument is applicable.

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According to these principles, parol evidence is never admissible to explain an ambiguity which is not raised by extrinsic facts (o). Thus, upon a devise to one of the sons of J. S. who has several, evidence is not admissible to show that one in particular was meant (p); and the devise is void for uncertainty (q).

As oral evidence is inadmissible either as a substitute for a written instrument required by law, or to *give effect and operation to such an instrument where it is defective, it follows *a fortiori* that it is not admissible to contradict, or even to vary, any instrument to which an exclusive operation (r) is given by law, whether that exclusive

Not admissible
to vary, &c.
* 1062

(o) *Doe v. Westlake*, 4 B. & A. 57.

(p) 2 Vern. 624-5. 5 Co. 68, b. 2 P. Wms. 137. *infra*, 1027, note (z); and 47 Ed. 3, 16, b. In *Harris v. The Bishop of Lincoln*, 2 P. Wms. 135, where a man limited his estate by will to his own right heirs by his mother's side, Lord Macclesfield held that he might mean either the heir of his mother's father, or of his mother's mother, and admitted parol evidence to prove which he meant, *qu. as to both points*.

(q) *Ibid*.

(r) As to the cases in which a written instrument has such an operation, *vid. infra*, 1043. A deed states the purchase-money on the sale of land to have been paid; evidence is inadmissible to prove an agreement at the time that part should be satisfied by work to be done by the purchaser, and that the money had not in fact been paid. *Baker v. Dewey*, 1 B. & C. 704—(1).

A promissory note purports to be payable on demand, evidence is inadmissible to show that it was not to be paid till after the death of the maker. *Woodbridge v. Spooner*, 3 B. & A. 233, or till certain estates had been sold, the defendant being the payee, and but a

(1) In Maine, Maryland and North Carolina, parol evidence cannot be given to prove the non-payment of the purchase money for lands, when the deed states that the consideration has been paid. *Steele v. Adams*, 1 Greenleaf, 1—*Dixon v. Swigget*, 1 Har. & J. 252—*Brocket v. Foscue*, Ruffin's Rep. 64.

Aliter, in Massachusetts, New York and Pennsylvania. *Wilkinson v. Scott*, 17 Mass. Rep. 257—*Shepard v. Little*, 14 Johns. 210. *Bowen v. Bell*, 20 Johns. 338—*Hamilton v. Ex'rs. of M'Guire*, 3 Serg. & Rawle, 355. *Jordan v. Cooper*, *ibid*. 564. *Weigley's Adm'rs. v. Weir*, 7 Serg. & Rawle, 309. See *Dyer*, 169. *Moore*, 569. 1 Hayw. (Tenn.) Rep. 70.]

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quality result from a peremptory rule of law, or from private compact.

To contradict
or vary a written
agreement.

Where the terms of an agreement are reduced to writing, the document itself, being constituted by the parties as the true and proper expositor of their admissions and intentions, is the only instrument of evidence in respect of that agreement, which the law will recognize so long as it exists, for the purposes of evidence (*s*). If the parties have contracted by deed, as the obligation under seal imports greater deliberation and more solemnity than a mere written agreement which is not under seal, no evidence, whether oral or written which is not under seal, can be admitted to contradict or to vary it (*t*).

surety. *Fell v. Hawkins*, 1 Moore, 535—(2). Or to show that a transfer of a ship, which was absolute on the bill of sale, was intended as a security only. *Robinson v. McDonnell*, 2 B. & A. 134. [See Post, 1009, note (2).]

(*s*) *Supra*, *Assumpsit*, 81; and see *Preston v. Merceau*, 2 Bl. R. 1249. *Rollston v. Hibbert*, 3 T. R. 406. *Hodges v. Drakeford*, 1 N. R. 270. *Pym v. Blackburn*, 3 Ves. 34. It is a general rule, that where an agreement has been reduced to writing, evidence of oral declarations made at the same time shall not be admitted to contradict or to alter it. A written agreement, however, where it is not under seal, may be altered by the addition of new terms by an oral agreement, which, in fact, constitutes a new agreement, incorporating the former one; or, as has been seen, such an agreement may be wholly discharged by parol, before any breach has occurred, *supra*, p. 127; and *Ld. Milton v. Edworth*, 6 Bro. P. C. 587. In such cases it is obvious that the evidence is adduced, not to vary the terms of an existing original agreement, but to show that it has been superseded or discharged.

(*t*) Where parties contract by deed, *assumpsit* will not lie; for where a man resorts to a higher security the law will not raise an *assumpsit* (*Toussaint v. Marlissant*, 2 T. R. 100); as where a surety takes a bond from his principal (*Ib.*) So a plaintiff cannot recover in *indebitatus assumpsit* upon an executed consideration where the contract was by deed (*Athy v. Parish*, 1 N. R. 104). The only excepted case is that of debt for rent, which rests on peculiar grounds (*Hardr.* 332. *Warren v. Consett*, 8 Mod. 107; *Com. Dig. tit. Pleader*, O. 15. *Kemp v. Goodal*, 1 Salk. 277). And where a subsequent parol agreement is inconsistent with a deed, the agreement cannot be set up against the deed (See the case of *Leslie v. De la Torre*, cited 12 East, 583). But an action of *assumpsit* may be maintained upon an agreement subsequent to the making a deed of charter party, the parol contract not being inconsistent with the contract by deed (*White v. Parkin*, 12 East, 578); where the obligor of a *respondentia* bond, promised, by indorsement upon it, to pay the amount to any assignee, it was held that an assignee might maintain *indebitatus assumpsit*. *Fenner v. Mears*, 2 Bl. Rep. 1269; but this was doubted by *Ld. Kenyon*, in *Johnson v. Collings*, 1 East, 104, and by *Bayley*, *J.* in *White v. Parkin*, 12 East, 582.

(2) [*S. P. Dow v. Tuttle*, 4 Mass. Rep. 414. *Thompson v. Ketcham*, 8 Johns. 189.]

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IV.

Extend or limit terms of agreement.

* Where the issue was on the plea of *plene administravit*, evidence that the defendant, upon executing a bond of submission to arbitration, had agreed to pay what should be awarded to be due, was rejected, as being either contradictory of or in addition to the agreement in the bond (u). So, oral evidence is not admissible to show that a bond, conditioned for the payment of money to the wife in case she survived, was intended in lieu of dower (y). Nor is such evidence admissible to show that a clause of redemption was omitted in an annuity-deed, lest it should render the transaction usurious (z). So, although it is an established * rule that a party may aver another consideration * 1004 which is consistent with the consideration expressed, no averment can be made contrary to that which is expressed in the deed (a).

Where the conveyance is mentioned to be in consideration of love and affection, as also for other considerations, proof may be given of any other, for this is consistent with the terms of the deed (b). But if one specific consideration be alone mentioned in the deed, no proof can be given

(u) *Pearson v. Henry*, 5 T. R. 6, the evidence was rejected at the trial; and upon motion for a new trial the propriety of the rejection was not disputed. 1 Bro. C. C. 54. 93. And see the observations of Blackstone, J. in *Preston v. Merceau*, 2 Bl. Rep. 1250; & *infra*, 1006.

(y) See *Mascal v. Mascal*, 1 Ves. 323; & *infra*, 1009, note (b).

(z) *Ld. Ingham v. Child*, 1 Bro. C. C. 92. *Ld. Portmore v. Morris*, 2 Bro. C. C. 219. *Hare v. Shearwood*, 3 Bro. C. C. 168. 1 Ves. jr. 241. But where a man and woman being about to marry, conveyed their lands to trustees, in trust, to dispose of the rents as the wife, without the consent of the husband, should appoint; notwithstanding which the husband received the rents during his life, and the wife after his death filed a bill in equity for an account, the court admitted parol evidence to prove, that before the settlement was made, the husband and wife agreed that the premises should be in trust for them during their joint lives; and that they were settled otherwise merely to protect them from sequestration by Cromwell, and on that ground relieved against a covenant in the settlement, by which the trustees were bound to pay the rents as the wife should appoint. *Harvey v. Harvey*, 2 Ch. C. 180; Fitz. 213. But where articles were reduced to writing and signed by the parties, and afterwards drawn up at length, and executed, Reynolds, B. held that the articles could not be restrained by the memorandum, there being no reference from the articles to the memorandum. *Lloyd v. Winne*, 5 G. 2. 1 Ford, 136.

(a) *Mildmay's case*, 1 Co. 176. *Bedell's case*, 7 Co. 39; 2 Roll. Ab. 786. [*Quarles & al. v. Quarles*, 4 Mass. Rep. 680.]

(b) Per *Ld. Hardwicke*. *Peacock v. Monk*, 1 Ves. 128. And see the case of *Villers v. Beaumont*, Dyer, 146, a. *Vernon's case*, 4 Co. 3.

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of any other, for this would be contrary to the deed; for where the deed says it is in consideration of such a particular thing, it imports the whole consideration, and negatives any other (c) (1). The case where no consideration is expressed in the deed, is, according to Lord Hardwicke, a middle case; and he held that proof of a valuable consideration in such a case was admissible (d) (2). But in general, as will be seen, evidence as to the real consideration is in all cases admissible with a view to fraud (e).

Where *A.* granted an annuity for his own life to *B.* which was secured by a bond and warrant of attorney, and judgment was entered, the court would not, after the death of *B.* permit the attorney of *B.* to prove a * parol agreement that *A.* should be at liberty to redeem the annuity on terms (f).

Where the agreement was, that *A.* for certain considerations, should have the produce of Boreham Meadow, it was held that he could not prove by parol that he was to

(c) Ibid. and see *Green v. Weston*, Bay. 209, and *Stratton v. Rastall*, 2 T. R. 366, and *infra*, 1045. [*Schermerhorn v. Vanderheyden*, 1 Johns. 139. *Maigley v. Hauer*, 7 Johns. 341.]

(d) *Peacock v. Monk*, 1 Ves. 128.

(e) *Infra*, 1016.

(f) *Haynes v. Hare*, 1 H. B. 659, and per Ld. Thurlow, nothing can be added to a written agreement, unless there be a clear subsequent independent agreement varying the former; but not where it is matter passing at the same time with the written agreement. *Rich v. Jackson*, 4 Bro. C. C. 519. *Ld. Portmore v. Morris*, 2 Bro. C. C. 219.

(1) [Where a deed, after stating a certain consideration, adds "and for other considerations," parol evidence is admissible to show what those other considerations were. *Benedict v. Lynch*, 1 Johns. Ch. Rep. 370. In Virginia, where a deed was made "in consideration of natural love and affection, and of one dollar," parol evidence was held admissible to show that other valuable considerations passed. *Harvey v. Alexander*, 1 Randolph, 219. So either party may, in that State, aver and prove a consideration different from that stated in the deed—but not to the prejudice of a bona fide purchaser without notice. *Duval v. Bibb*, 4 Hen. & Mun. 113. So a deed may, in equity, be proved to have been made in consideration of marriage, though not so expressed in the deed. *Eppes & al. v. Randolph*, 2 Call, 125.

It is said in the case of *Garret v. Stuart*, 1 M'Cord, 514, that a different consideration from that expressed in the deed cannot be shown in a court of law, but that a less or greater consideration of the same character may be shown.]

(2) [If a deed conveying land contains nothing respecting the consideration, parol evidence concerning it is admissible. *Davenport v. Mason*, 15 Mass. Rep. 92.]

have both the soil and produce of Millcroft and Boreham Meadow (g).

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So in an action on a bond conditioned for payment absolutely, the defendant cannot plead an agreement that it should operate merely as an indemnity (h).

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to vary, &c.

In an action of trespass, where the defendant insists upon a release executed by the plaintiff, and in terms including the trespass in question, the plaintiff cannot defeat the effect of the release by proof that the arbitrators who awarded the release have not taken into their consideration the particular trespass (i).

Upon the same principles evidence is inadmissible of a parol agreement prior to or contemporary with the written instrument, and which varies its terms, as to show that a note made payable on a day certain was to be payable upon a contingency only (k), or upon some other day (l).

Where a policy was on an adventure from Archangel to Leghorn, the defendant was not allowed to prove an agreement previous to the signing of the policy, that the adventure should begin from the Downs * only (a). Where a * 1006 ship was chartered to wait for convoy at *Portsmouth*, it was held that evidence could not be received of an agreement to substitute *Corunna* for *Portsmouth* (m).

Where a contract is entered into for the sale of goods, and a bill of sale is afterwards executed, the bill of sale is the only evidence of the contract which can be received (n) (1), and parol evidence of the agreement cannot be re-

(g) *Meres v. Ansell*, 3 Wils. 275.

(h) *Mease v. Mease*, Cowp. 47.

(i) *Shelling v. Farmer*, 1 Str. 646.

(k) *Rawson v. Walker*, 1 Starkie's C. 361.

(l) *Free v. Hawkins*, 1 Moore, 28. 7 Taunt. 278. [*Erwin v. Saunders*, 1 Cowen, 249. *Rose v. Learned & al.* 14 Mass. Rep. 155.]

(a) *Kaimes v. Knightly*, Skinn. 54. *Uhde v. Walters*, 3 Camp. 16. *Weston v. Emes*, 1 Taunt. 115. Note, the case of *Kaimes v. Knightly*, is cited in *Bates v. Grabham*, 2 Salk. 444, but mis-stated.

(m) *Leslie v. De la Torre*, cited 12 East, 583. Note, that the charter-party was under seal.

(n) *Lano v. Neale*, 2 Starkie's C. 105. The previous contract there was for a ship, 40 tons of iron kintlage, &c.; the bill of sale was of a ship, together with all stores, &c. in the usual form, and silent as to kintlage; and held that the vendee could not recover for non-delivery of the kintlage.

(1) [A bill of parcels delivered by A. stating the goods as bought of B. and A. is not conclusive evidence against A. that the goods were the joint property of B. and A.; but the real circumstances may be explained by parol. *Harris v. Johnston*, 3 Cranch, 311.

Where

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ceived, even although the written instrument of sale be inadmissible for want of a stamp (o).

The same rule applies if such parol agreement *add* to the terms expressed. Thus, in the case of *Preston v. Merceau* (p), the landlord, in an action for use and occupation, under a written agreement for rent at 26*l.* per annum, was not allowed to show, *in addition*, by parol evidence, that the tenant had also agreed to pay the ground-rent. Mr. J. Blackstone is said in that case to have observed, that although the

- * 1007 * Court would neither alter the rent, nor the terms which were expressed in the agreement, yet that with respect to collateral matters it might be different; the plaintiff might show who was to put the house into repair, or the like, concerning which nothing was said. The question, how far collateral matter may be proved by parol, will be considered hereafter (o), at present it may be observed, that to permit terms to be ingrafted by mere parol evidence upon a written agreement, would be attended with all the danger, laxity and inconvenience, which the general rule is calculated to exclude; for an agreement might by such additional terms be as effectually altered as if the very terms of the agreement had been changed by the operation of parol evidence. (1)

(o) Per Lord Kenyon, in *Rolleston v. Hibbert*, 3 T. R. 413. And see *Drakeford v. Hodges*, 1 N. R. 270; where it was held, that if a parol warranty and agreement to assign be reduced to writing, and the assignment be afterwards legally executed, the warranty cannot be proved by parol.

(p) *Preston v. Merceau*, 2 Bl. Rep. 1249. So in *Rich v. Jackson*, 4 Bro. C. C. 515, where an agreement specified the rent and the term, but was silent as to taxes, the court refused to receive parol evidence on the part of the lessor, that previous to the drawing up of the memorandum it had been agreed and understood by the parties, that the rent was to be paid clear of all taxes.

(o) *Infra*, 1040. 1046, 7, &c.

Where A. sold to B. several bags of hops, and gave a bill of parcels stating the number of the bags, the weight, price, &c. with these words, "the hops are warranted to be first quality;" in an action by B. against A. for a false warranty, it was held that A. was not precluded by the bill of parcels from showing that the hops were warranted only in case they were carried by B. to a particular place. *Wallace v. Rogers*, 2 N. Hamp Rep. 506. In *Schuyler v. Russ*, 2 Caines' Rep. 202, in an action on a written warranty of soundness, parol proof was held to have been rightly admitted that the vendor, at the time of sale, informed the vendee of a defect, which was visible, and called his attention to it: The defect was held not to be within the purview of the contract. See *Smith v. Williams*, cited in the next note.]

- (1) [Parol evidence is not admissible to prove an agreement be-

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IV.

By the addition of terms.

Where an agreement specifies only the rent and the term, but is silent as to repairs, it is obvious that such an agreement may be as completely varied by proof of an additional stipulation that the landlord should lay out a specific sum in alterations, as by evidence that the rent shall be diminished, without any stipulation as to repairs. Cases in which the additional terms constitute in fact a new agreement, incorporating the former written terms, or continuing the former contract (*q*), or amount to a substantive collateral agreement (*r*)—Those also, where certain terms are ingrafted, upon an agreement, which is silent on the point, by some known custom, or general understanding (*s*)

(*q*) *Supra*, 1002; and see *Warren v. Stagg*, cited 3 T. R. 591. *Coff v. Penn*, 1 M. & S. 21. *Lord Milton v. Edworth*, 6 Bro. P. C. 587.

(*r*) *Granville v. Duchess of Beaufort*, 1 P. Wins. 114. 2 Vern. 648; & *supra*, 1002, note (*t*).

(*s*) *Infra*, 1040.

tween mortgagor and mortgagee, that the former should remain in possession of the mortgaged premises. *Colman v. Packard*, 16 Mass. R p. 39. Nor to prove that a lessor, in consideration of the rent reserved, promised to make any other repairs than those which are stipulated in the lease. *Brigham v. Rogers*, 17 Mass. Rep. 571. Nor to prove a warranty of the soundness of a slave, when there is a written instrument conveying the slave, and containing a warranty of title only. *Smith v. Williams*, 1 Car. Law Repos. 263. 1 Murphey, 426. See *Barber v. Brace*, 3 Conn. Rep. 9. In debt on a bond conditioned for payment of an indent for 1,200*l.*, evidence of a parol agreement between the parties, that if the indent was not returned on the day mentioned in the condition, it should be converted into a special debt, was held to be inadmissible. *Atkinson v. Scott*, 1 Bay, 307. So where property is pledged by a written contract as security for a certain sum advanced, parol evidence is not admissible to prove an agreement that the property shall be held until certain sums, afterwards advanced, are paid. *Hamilton v. Wagner*, 2 Marsh. 333. Where the defendant gave the plaintiff a writing acknowledging the sale of a note of hand, and the receipt of part payment, and that the balance was to be paid when the money should be collected on the note; parol evidence was held inadmissible to prove that the defendant, at the time of the contract, promised to commence an action within ten days against the maker of the note. *Clark v. McMillan*, 2 Car. Law Repos. 65. Parol evidence that a seller of land agreed, at the time of sale, to extinguish an interfering claim, is not admissible. *Macfar v. McDowell*, 4 Bibb, 473: Nor to enlarge or diminish the quantum of articles for which a receipt is given; nor to show that a further sum, not mentioned in the writing, was to be paid on a contingency. *Querry v. White*, 1 Bibb, 271. In an action by an assignee of a bond against the assignor, upon a written assignment in general terms, parol evidence cannot be received to show that the

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—And lastly, those where the instrument offered as evidence to prove a collateral fact, has, in * the particular instance, no exclusive operation (t), fall, as will be seen, under a different consideration.

At present, assuming the particular instrument to be that which the parties have agreed upon as the evidence of their intentions, in respect of the particular transaction, the only question is, whether the parol evidence, which is adduced to superadd something to the written agreement, does not vary that agreement; if it does, it is inadmissible.

Where the conditions of sale described only the number and kind of timber-trees to be sold by lot, but said nothing as to the weight of the timber, the defendant, in an action for not completing his purchase according to the conditions, was not permitted to prove that the auctioneer had, at the sale, warranted the timber to amount to a certain weight; for if that representation induced him to become the purchaser he ought to have had it reduced to writing at the time (u) (1). *Ld. Ellenborough*, in that case,

(t) *Infra*, 1046.

(u) *Powell v. Edmunds* 12 East, 6. And see *Buckmaster v. Harrop*, 13 Ves. 471. *Higgins v. Clowes*, 15 Ves. 516. *Jenkinson v. Pepys*, cited 6 Ves. 330. *Meres v. Ansell*, 3 Wils. 275. *Rich v. Jackson*, 4 Bro. C. C. 515. *Gunnis v. Erhart*, 1 H. B. 289. But where previous to the sale of a leasehold estate by auction, the purchaser promised the vendor to indemnify him against the covenants entered into by the lessee, a specific performance was decreed, although the terms of the sale were silent as to such indemnity. *Pember v. Mathers*, 1 Bro. P. C. 54.

defendant expressly guarantied payment of the bond. *O'Harra v. Hall*, 4 Dallas, 340, *Circuit Court of U. S.* In this case, *Peters, J.* thought such evidence would be admitted by the courts of Pennsylvania, where there is no Court of Equity—and in the case of *Field & al. v. Biddle*, 1 Yeates, 132, 2 Dallas, 171. S. C. parol evidence was held admissible to show that when a bond was executed, it was agreed that it should be void on a particular contingency. So in *Birchfield v. Castleman*, Addison's Rep. 181, in an action of covenant against a vendor of land, who had covenanted "to make good the land against all persons claiming"—where the vendee had been ejected in consequence of a judgment which had been irregularly entered, it was held that parol proof was admissible to show that when the deed was executed, the vendor agreed to defend all suits. See also *M'Meen v. Owen*, 2 Dallas, 173. 1 Yeates, 132. S. C. *Wallace v. Baker*. 1 Binney, 616. *Zantzinger v. Ketch*, 4 Dallas, 132. *Hurst's Lesse v. Kirkbridge & al.*, cited 1 Yeates, 139.]

(1) [The general rule of law is, that parol evidence of declara-

observed, that if such evidence were admissible, in what instance might not a party, by parol testimony, superadd any term to a written agreement, which would be setting aside all written contracts, and rendering them of no effect. In such cases it is to be presumed that the parties, in expressing their intention, have expressed the whole of it, subject to those incidents and consequences which the law annexes to the terms which they have used.

* Where a written agreement for the sale of goods is silent as to the time of delivery, the law implies a contract to deliver them within a reasonable time, to be judged of according to the circumstances. In such a case evidence is inadmissible of a contemporaneous oral contract by the purchaser to take them away immediately (u) (1). * 1009

Parol evidence is also inadmissible for the purpose of altering the legal operation of an instrument, by evidence of an intention to that effect, which is not expressed in the instrument (x). Thus the defendant cannot be admitted to prove that at the time of making a promissory note it was agreed, that when the note became due payment should not be demanded, but that the note should be renewed (y). Intention to alter the legal operation of an instrument.

So also parol evidence is inadmissible to show that a bond, purporting to be absolute, was intended merely as an indemnity, and that the plaintiff has not been damnifi-

(u) *Greaves v. Ashlin*, 3 Camp. 426.

(x) In equity, however, it seems that parol evidence is admissible to show that the testator intended that specific legacies should be paid out of particular funds (*Cliff v. Gibbons*, 2 Ld. Raym. 1324.) But not to show that a testator intended to exempt his personal estate from debts. See *Reeves v. Newenham*, 2 Ridg. 21. 35. 44.

(y) *Hoare v. Graham*, 3 Camp. 57. [and Mr. Howe's note.] *Hogg v. Smith*, 1 Taunt. 347. *Supra*, 279 (t).

tions of an auctioneer is not admissible to vary the written terms of sale. *Wright's Lessee v. Deklyne*, 1 Peters' Rep. 204. But where an advertisement stated that a certain farm would be sold, without stating that the whole would be sold at one time, evidence of declarations by the sheriff, at the time of sale, that a particular part of the farm would not be sold, was received. *ibid.* Parol evidence was held admissible to show that a slave, sold at auction, was sold subject to every defect except that of title, though the auctioneer's advertisement described the slaves as "prime negroes." *Limehouse v. Grey*, 1 Const. Rep. 73.]

(1) [Where there was a memorandum for the hire of a slave at a certain sum for the first year, and a larger sum for two succeeding years, it was held that parol evidence was admissible to prove that the money was to be paid quarterly. *Stone v. Wilson*, 1 Const. Rep. 68.]

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* 1010

ed (z) (2), or to show that the directions of a will were intended to operate in satisfaction of a bond (a), or that a bond given by the husband before marriage, conditioned to secure 400*l.* to the wife, in case she survived the husband, was given in lieu of dower (b).

* Where a man gave a bond that his executors should within six months after his death, pay 5,000*l.* to trustees, in trust, to apply the interest to the maintenance of his natural son till he should attain the age of twenty-one, and

(z) *Mease v. Mease*, Cowp. 47.

(a) *Jeacock v. Falkner*, 1 Bro. C. C. 295.

(b) *Finney v. Finney*, 1 Wils. 34. But where a man who had agreed to settle 100*l.* a-year on his intended wife, finding himself ill, made his will, and afterwards left her 100*l.* a-year, and recovering, married her, Clarke, B. held, that evidence was admissible to show that he intended her one of the annuities only, *Mascal v. Mascal*, 1 Ves. 323.

(2) [Parol evidence is admissible to prove that a deed was delivered as an escrow. *Pauling & al. v. United States*, 4 Cranch, 219. *Fairbanks v. Metcalf*, 8 Mass. Rep. 230. *Couch v. Meeker*, 2 Conn. Rep. 302. But it is not admissible to prove that a deed, absolute on the face of it, was intended for a mortgage. *Flint v. Sheldon*, 13 Mass. Rep. 443. *Streator v. Jones*, 1 Murphey, 449: Unless fraud be suggested; *Strong v. Stewart*, 4 Johns. Ch. Rep. 167. (*Aliter*, in Connecticut, in Equity, *Washburn v. Merrills*, 1 Day, 139.) Nor that a deed, absolute on the face of it, was given in trust. *Dickerson v. Dickerson*, 1 Car. Law Repos. 262. *M'Teer v. Sheppard*, 1 Bay, 461. *Goodwin v. Hubbard*, 15 Mass. Rep. 218. *Flint v. Sheldon*. ubi sup. But where an assignment purported to be absolute, but the answer of the assignee to a bill for relief admitted it to be different from its purport, parol evidence was admitted to show the real intention of the parties. *Moses v. Murgatroyd*, 1 Johns. Ch. Rep. 119. And where the grantor remained till his death in possession of lands conveyed by an absolute deed, and the grantee did not call for an account of rents and profits; parol evidence was admitted to prove that the conveyance was on a secret trust for the benefit of the grantor, and his heirs. *Gay v. Hunt*, 1 Murphey, 141. See *St. John v. Benedict*, 6 Johns. Ch. Rep. 111.

In Pennsylvania, it has been decided that parol evidence may be given to prove that a mortgage given to A. was in fact intended for the security of B. *Peterson v. Wilking*, 3 Dallas, 506. On a bill in equity to set aside certain bonds and mortgages which purported to be absolute, evidence was admitted to show that they were really given as counter securities. *Todd v. Rivers' Executors*, 1 Desauss. 155. *Aliter*, in a court of law. *Jackson v. Foster*, 12 Johns. 488.

In Kentucky, parol evidence is held admissible to prove that a bill of sale of a slave was to be cancelled, and the slave re-vest in the maker of the bill. *Trumbo v. Cartwright*, 1 Marsh. 582. See *Dabney & al. v. Green*, 4 Hen. & Mun. 101. *Ross v. Norvell*, 1 Wash. 14.

See other cases collected by Mr. Norris, in his edition of *Peake on Evidence*, 178.]

then to pay him the principal, but in case he should die before the father, or under the age of twenty-one, then in trust over; and by his will directed his trustees to lay out 15,000*l.* in trust, to pay 200*l.* a year to his said son till twenty-five, and then to pay him the principal, with remainder over if he died before that age, the Chancellor refused to admit parol evidence of declarations alleged to have been made by the testator, for the purpose of explaining the will, and showing it to be in satisfaction of the bond (c).

Where a man conveyed his estate to certain uses, reserving to himself the power of changing or revoking them, and afterwards conveyed it to trustees, in trust, to pay his debts, and then in trust to re-convey, it was held that proof of a declaration by one of the trustees under the latter deed, that the party did not intend to revoke the former by the latter, was inadmissible (d).

Parol evidence of the intention of the testator is in no case admissible to contradict the express terms of a will (e). Intention of testator to vary the terms of a will.

* Where a legacy was given to A. B., and, in case of his death, to his wife, and the wife after his death received the legacy, and the question at law was, whether she received the legacy in her own right, or as her husband's representative; it was held that evidence was inadmissible to prove that the testator when he was in *extremis* had declared his intention to be, that the husband should have the interest only during the life of the wife, and that if she survived him she should have the principal (f). * 1011

Where a father by his will made his three brothers, who

(c) *Jeacock v. Falkener*, 1 Bro. C. C. 295.

(d) By Reynolds, B. and by the Chancellor and Master of the Rolls, *Fitzgerald v. Fancomb*, Fitz. 207.

(e) A testator gave one of his debtors certain messuages, and after other legacies and devises gave all the rest of his estate, not thereby devised, to his executors, or such of them as should act, and made that debtor and J. S. his executors. They both acted, and J. S. filed a bill against the debtor for a proportion of his debt; the debtor offered parol evidence to show that the testator meant that the debt should be extinguished, and that he gave the attorney who drew the will instructions to release it, but that the attorney, and a counsel, whose opinion was taken, were of opinion that the debt would be released by implication. But Lord Talbot said that the cases went no farther than to let in parol evidence to rebut an equity or resulting trust; but as the residuary clause directed the property not before disposed of by the will, to be divided between the executors, and as the debt in question had not been previously disposed of by the will, the evidence contradicted the express words of the will. *Brown v. Selwin*, Ca. Temp. Talbot, 240. 7 Bac. Ab. 337, 6th edit.

(f) *Lowfield v. Stoneham*, 2 Str. 1261.

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were presbyterians, together with a clergyman, guardians of his children, in general terms, King, Chancellor, on a bill filed by the three against the clergyman, to have the children delivered up to them, rejected parol evidence of directions alleged to have been given by the testator, that the children should be educated as presbyterians; and he said, that as that was not expressed in the will parol evidence was no more admissible in the case of a devise of a guardianship than in the case of a devise of land (g).

Oral declarations of the testator cannot be received for the purpose of explaining his intention (h), even where it is apparently ambiguous on the face of the will. Where * 1012 the testator, after mentioning his wife * and niece in his will, afterwards gave a particular estate to her for life, the Lord Chancellor refused to receive parol evidence to show which was meant (i).

So such extrinsic evidence is inadmissible to alter the legal construction of words, or to affect a legal presumption arising from the construction (k).

Where a legacy was given to A. B. who was dead at the time, it was held, that evidence was not admissible to show the intent of the testator that the legacy should be transmissible (l).

Where a devise was to the son of the devisor, and the heirs of his body, on condition that he, they, or any of them, should not aliene, discontinue, &c.; parol evidence was held to be inadmissible to show the intention of the devisor, that the condition should extend to the son and his heirs (m).

So it was held to be inadmissible to show that the testator did not intend to pass the reversion and remainder in fee of certain settled lands, by a devise of all lands, tenements and hereditaments out of settlement (n).

An estate was devised in trust to receive the profits for three years, and if the heiress of the devisor should marry

(g) *Storke v. Storke*, 3 P. Wms. 51. But see 2 Ves. 56.

(h) 2 Vernon, 624. [*Richards v. Dutch & al.*, 8 Mass. Rep. 506. *Sword v. Adams*, 3 Yeates, 34. *Torbert v. Twining*, 1 Yeates, 432.]

(i) *Castleton v. Turner*, 3 Atk. 258. *Hampshire v. Peirce*, 2 Ves. 216.

(k) Per Ld. Talbot, 2 Bro. C. C. 821.

(l) *Maybank v. Brookes*, Bro. C. C. 84.

(m) *Cheney's case*, 5 Co. 68. 2 Bro. C. C. 821.

(n) *Strode v. Falkland*, 2 Vernon, 621; but it is stated by Salkeld that the decree was reversed; according to Vernon, it was compromised.

Lord G. within that time, in trust for her, for life, with remainder to her children in strict settlement; and if the marriage should not happen, in trust for Lord F.; the marriage did not take place; and it was held that parol evidence was inadmissible of a declaration by the testator that Lord G.'s refusal should not disinherit his heir at law (c).

PART
IV.

To vary legal
construction,
&c.

* Upon a question of legal construction upon the terms * 1013 of a will, whether the deviser gave an estate for life, or an estate in fee, Lord Holt was of opinion that the intention of the deviser must be collected, not from collateral matters, but from the will itself; but the other judges were against him, and their opinion was confirmed in the exchequer chamber (p). And in some other instances the courts have taken into consideration the state and circumstances of the family, in order to enable them the better to construe the testator's real intention as to the *personal* estate (q) (1).

(o) *Bertie v. Falkland*, 1 Salk. 231. 2 Vern. 333.

(p) *Cole v. Rmsinson*, 1 Salk. 234. See *Doe v. Fyldes*, Cowp. 833. *Doe v. Dring*, 2 M. & S. 455. *Bootle v. Blundell*, 1 Merivale, 316. *Gondrille v. Edmonds*, 7 T. R. 640. *Standen v. Standen*, 2 Ves. jun. 503. Vin. Ab. tit. *Devise*, Y. 2, pl. 10. *Pepper & ux. v. Winyewe*, Bac. Ab. tit. *Wills*, 367, 6th edit.

(q) See the cases cited in the preceding note; and see *Baldwin v. Karver*, Cowp. 312; where Lord Mansfield observed, that all cases upon the construction of wills depend upon the particular penning of the wills themselves, and the state of the families to which they relate; and in the case of *Jones v. Morgan*, (cited in *Lytton v. Lytton*, 4 Bro. Ch. 1,) the same learned judge observed, that to construe a will, the *intent* is to be taken from the whole will together, applied to the subject-matter to which the will relates. Sir D. Evans, 2 Pothier, 212, remarks also, that Lord Loughborough, in quoting the opinion of Ld. Mansfield, took notice of different cases in which certain words were held to apply to a failure of issue at a certain period, although taking the words strictly, and construing them without considering the circumstances, would have imported a general failure of issue. (Vide *Lytton v. Lytton*, 4 Bro. Ch. 1.) In the case of *Masters v. Masters*, (1 P. W. 420,) the testator, after bequeathing a legacy to two particular hospitals in Canterbury, by his codicil bequeathed another sum "to all and every the hospitals." As the testator had by his will taken notice of two hospitals in Canterbury, and as it appeared in evidence that he lived there, it was held, that the intention sufficiently appeared to apply the latter bequest to the hospitals in Canterbury. And see the distinction taken by Lord Thurlow in *Jeacock v. Falkener*, 1 Bro. C. C. 296.

(1) (In *Sargent & al. v. Towne*, 10 Mass. Rep. 303, it was held that a devise, which, by the terms used, would carry only a life estate, might be extended to carry an estate in fee, by showing by

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IV.

* 1014

To vary legal
construction,
&c.

Where, however, extrinsic evidence is allowed to operate so far as to give to the terms of a will a different * construction from that which the terms abstractedly imply, the rule seems to be carried farther than is warranted by principle or analogy (s).

Where evidence was offered of the value of an estate charged with sums of money payable to the sisters of the devisee, as an argument in favour of a particular construction, the Court of King's Bench held that it was nugatory and inadmissible as matter of proof, although it might have been of great weight had the court been called upon to make a will for the testator (t).

(s) See Lord Hardwicke's observations, in *Blinkhorn v. Feast*, 2 Ves. 28. *Strode v. Russell*, 2 Verf. 624. *Castleton v. Turner*, 3 Atk. 258. *Petit v. Smith*, 1 P. Wms. 9. *Brown v. Langley*, 2 Barn. 118. *Brown v. Selwin*, C. Temp. Talbot, 240; *vide supra*, 1010, note (c). *Jeacock v. Falkener*, 1 Bro. C. C. 296. The doctrine once prevailed that a court might receive evidence which was inadmissible before a jury; that, however has since been denied, per Buller, J. 2 H. B. 522.

(t) *Doe v. Fyldes*, Cowp. 833. In *Oates v. Brydon*, 3 Burr. 1895, Ld. Mansfield went into an inquiry as to value, in order to found an argument upon the result, as to the construction of a will; and in order to show that property of such small value could not be intended to be the subject of particular limitations; but the same

- parol that the subject of the devise was wild land, from which a tenant for life could derive no benefit. Where a tract of land, conveyed by deed, was described as *the farm on which the grantor resided*, parol evidence was admitted that a particular piece of land, claimed under the deed, was at the time of the grant in a state of nature, unenclosed and separate from the rest of the farm, and that the grantor remained in possession, and occupied it as his own until his death—to show that it was not within the grant. *Doolittle & ux. v. Blakesley*, 4 Day, 265. See also *Foster v. Woods*, 16 Mass. Rep. 116. *Leland v. Stone*, 10 ib. 461. *Richards v. Dutch & al.* 8 ib. 506. Parol testimony of the testator's circumstances, situation, connexion with the legatees, and his transactions between the making of his will and the time of his death, is admissible to discover his intention, by explaining things or persons denoted by doubtful words, *Reno's Ex'rs. v. Davis & ux.* 3 Hen. & Mun. 283. *Shelton & al. v. Shelton*, 1 Wash. 53.

Where a plaintiff in an execution gave to an officer, who had the defendant in custody on a *ca. sa.* a writing, stating that he wished the officer to show the prisoner as much indulgence as could be shown with safety to himself, and without hazarding in any way the debt; it was held that the writing being in itself ambiguous, parol evidence of the conversation between the plaintiff and the officer, at the time, and of collateral extraneous facts relating to the prisoner's situation, was admissible, to ascertain the nature and extent of the indulgence which was to be shown to him. *Ely & al. v. Adams*, 19 Johns. 313.]

In the late case of *Doe d. Oxendon v. Sir A. Chichester* (u), it was observed by Sir V. Gibbs, that courts of law had been jealous of extrinsic evidence for the purpose of explaining the intention of a testator; and that he knew of one case only in which it is permitted, that is, where an ambiguity is introduced by extrinsic circumstances.

* The objection does not apply where evidence is offered not for the purpose of *contradicting* or *varying* the effect of a written instrument of admitted authority, but where on the contrary it is offered in order to *disprove* the legal existence, or rebut the *operation* of the instrument. To do this, is not to substitute mere oral testimony for written evidence, the weaker for the stronger, but to show that the written ought to have no operation whatsoever, an object which must usually be accomplished by oral evidence.

* 1015
Admissible to
disprove, &c.

As a written instrument in general derives its authenticity from the aid of external evidence, it may in like manner be defeated. Thus a written instrument may be impeached by extrinsic evidence, on the ground of fraud, even in the case of a record (x). Fraud.

So also in the case of a private agreement oral evidence is admissible to prove a fraudulent omission (y). Where there was an agreement for a lease, evidence was admitted of a parol agreement that the rent should be clear of all taxes, but that the plaintiff reduced the agreement to writing, without mentioning that point, and that the defendant could not read (z). In order to impeach a will, and to show that it had been fraudulently submitted to a testator for his signature, parol evidence was admitted, that at the time of signing the will he asked whether the contents

learned judge seems to have been of a different opinion in the case of *Doe v. Fyldes*, just cited, where he concurred with the other judges; and in *Goodtitle v. Edmonds*, 7 T. R. 635. Ld. Kenyon intimated that the case of *Oates v. Brydon* had not been satisfactory to the profession, and that he believed that Ld. Mansfield had afterwards doubted, whether he had proceeded upon substantial grounds. In the case of *Bengough v. Walker* (15 Ves. 514), the Master of the Rolls said, "You cannot refer to extrinsic evidence to construe a will, but you may to show with reference to what a will was made."

(u) 4 Dow, 65, and *infra*, 1027.

(x) *Supra*, Vol. I. 252, tit. *Fraud*, 586; and see tit. *Forgery*, 581. But such evidence is not admissible to defeat a record, by showing a rasure, &c. as that a rasure was made in a precept since it was issued. *Dickson v. Fisher*, 4 Burr. 2267; *infra*, 1020.

(y) *Lord Ernham v. Child*, Bro. C. C. 92. 3 Atk. 389.

(z) *Jones v. Statham*, 3 Atk. 388. Note, the agreement was executory.

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To disprove,
&c.
Fraud.

* 1016 were the same with those of a former will, and that he was answered in the affirmative (a). So it may be shown that one will was substituted for another (b). So in general it * may be shown that fraud and imposition were practised upon a party to an instrument, by a fraudulent omission, or misrepresentation of the contents, especially if the party were illiterate (c).

So in the case of all covenants to stand seised to uses a party is at liberty to prove other considerations than those mentioned in the deed (d).

In the case of *Filmer v. Gott* (e), where the considerations mentioned in the deed were 10,000*l.*, and natural love and affection, the lords commissioners of the great seal directed an issue to try whether natural love and affection formed any part of the consideration, the estates being worth 30,000*l.* On appeal to the House of Lords it was held that the commissioners had done right; and the jury finding that natural love and affection formed no part of the consideration, the deed was afterwards set aside by the Lord Chancellor.

Although a party, in order to prove fraud, may adduce extrinsic evidence to show the inadequacy of the consideration when compared with the value of the estate, the party who claims under the deed cannot be admitted to show a consideration in support of it, different from that which is expressed. Upon a bill to set aside a conveyance of an estate of inheritance worth 40*l.* a year, conveyed to the defendant by an infirm old man of the age of 72, in consideration of an annuity of 20*l.*, it was held, that the defendant was * 1017 not at liberty to show blood and kindred to have been the real consideration of the conveyance, and to prove that the grantor had often declared that he had rather that his kinsman (one of the defendants) should have the estate for this annuity than any other person for a valuable consideration (f).

(a) *Doe d. Small v. Allen*, 8 T. R. 147.

(b) *Ibid.*

(c) 3 Atk. 389. As where a mortgagee draws the mortgage deed and omits the covenant for redemption. So where there were to be two mortgage-deeds, an absolute one and a defeasance, it was held that the mortgagor might prove an agreement to execute the latter. *Ibid.*

(d) *Per Ld. Kenyon*, 3 T. R. 475.

(e) Cited by *Ld. Kenyon*, in *R. v. Scammonden*, 3 T. R. 474. 7 Bro. P. C. 70.

(f) *Clarkson v. Hanway & al.* 2 P. W. 203.

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&c.
Fraud.

In cases also where the public have an interest in the real nature of a transaction between two parties, they are not bound by the representation made in the private agreement, but may impeach it *pro tanto*, as to any misrepresentation; for this misrepresentation may properly be considered as a species of fraud upon the public. Thus, although the private deed of conveyance of an estate expressed twenty-eight pounds to be the purchase-money, it was held, that as between two contending parishes it was competent to one of them (*g*) to show that the real consideration was 30*l.*, in order to establish a settlement under the statute (*h*). And, in general, extrinsic evidence is admissible for the purpose of avoiding a particular instrument, on the ground of a fraud attempted to be practised on the revenue, as by proof that under the particular circumstances the instrument ought to have been differently stamped (*i*).

Parol evidence is also, in general, admissible, for the purpose of showing that an instrument is void, on the ground of some illegality committed by the parties; as that it is void for usury, or because it is given to secure a gaming debt, or founded upon some illegal consideration (*k*). And, in general, where a statute * avoids an instrument * 1018 which does not fully state the consideration on which it is founded, extrinsic evidence is admissible to show that the directions of the statute have not been complied with.

To avoid, &c.
illegality.

Oral evidence is also admissible for the purpose of correcting a mistake; a practice more frequent in courts of equity than of common law (*l*). In such cases, especially where recourse is had to equity for relief, the extrinsic evidence is not offered to contradict a valid existing instrument; but to show, that from accident or negligence the instrument in question has never been constituted the ac-

To avoid, &c.
Mistake.

(*g*) *R. v. Scammonden*, 3 T. R. 474; see also *R. v. Laindon*, 8 T. R. 379; & *infra*, 1052. [*Overseers of New Berlin v. Overseers of Norwich*, 10 Johns. 229.]

(*h*) 9 Geo. I. c. 7. s. 5.

(*i*) *Supra*, 293, and *infra*, tit. Stamp.

(*k*) *Supra*, 128. 282. So that it has been obtained by *duress*.

(*l*) The usual, and certainly the safer course, in case of a mistake, is to apply to a court of equity for relief, in the first instance; but a party is not obliged to resort to equity for relief; and there seems to be no reason why such evidence should not be received by way of defence in a court of law.

PART tual depositary of the intention and meaning of the parties (1).
IV.

To avoid, &c. Where parties covenanted to convey an estate in trust, to raise 30,000*l.* to pay off debts and incumbrances, with
Mistake.

(1) [Where a contract in writing is made and signed, but the name of the party contracted with is omitted by mistake, the omission may be supplied by parol evidence. Per Parker, C. J. *Brown v. Gilman*, 13 Mass. Rep. 161. Parol proof, however, is generally inadmissible, in a court of law, to show a mistake in a written agreement. *Fitzhugh v. Runyon*, 8 Johns. 375. See *Jackson v. Sill*, cited *post*, 1027, note (1).]

The rules of evidence are the same in a court of chancery as those of common law: It will not, therefore, receive parol evidence tending to prove an agreement different from one made by the same parties under seal. *Dwight v. Pomeroy & al.* 17 Mass. Rep. 303. When a party applies to a court of chancery to enforce specific performance of a written contract, the adverse party is allowed to show by testimony, that the instrument relied on does not contain the true agreement of the parties, or the whole of it; and in such case, the court will withhold the exercise of its powers, unless the party seeking relief will do full justice to the other party, according to the facts which are made to appear to the court. *ibid.* Per Parker, C. J.

The name of one of the children of a testator being omitted in the will, the court of chancery permitted parol evidence to be given that the omission was through mistake, and corrected it. *Geer v. Winks*, 4 Desauss. 85. But where the scrivener was offered to support, by parol evidence, an allegation of a mistake in a will, and to prove that the testator intended to dispose of his property in a manner not apparent on the face of the will, he was not permitted to be heard. *Rothmaler v. Myers*, *ibid.* 215. So where the grantor in a deed of gift gave a certain sum to trustees to be invested in property for the use of his brother "J. P.'s lawfully begotten children," the court refused to admit parol evidence that the grantor intended to confine the grant to the children of a first marriage, and that he gave instructions to the scrivener accordingly. *Holmes v. Simons*, 3 Desauss. 149. Parol evidence to prove that certain property was intended to have been comprehended in a deed of settlement, was rejected. *Barret v. Barret*, 4 Desauss. 447. So parol evidence was rejected which was offered to extend the meaning and operation of receipts given to an administrator by the heirs of the intestate for their shares of the estate, to prove a mistake; as that their interest in the real estate was intended to be included. *Harris v. Dinkins*, 4 Desauss. 60. So where a wife joined her husband in conveying her real estate in fee to a third person, and he conveyed it back to the husband, who afterwards conveyed certain lands and slaves to trustees for the use of his children, and then died insolvent; it was held, on a bill by the trustees against the executors of the husband, that parol evidence was inadmissible to prove a mistake in drawing the deed of conveyance of the wife's land, and that it was intended to settle the land in trust for their children. *Lloyd v. Ingle's Ex'rs*. 1 Desauss. 333. Parol evidence is not admissible (in order to vary the effect of the dispositions of a will,) to show that a scrivener, in drawing it, inserted words of which he did not know the meaning. *Iddings & al. v. Iddings*, 7

remainder over, parol evidence was admitted to show that it was the concurrent intention of all the parties to raise that sum in addition to the sum of 24,000*l.* with which the estate was incumbered (n).

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To avoid, &c.
Mistake.

In cases also of marriage settlements, where mistakes have been committed, and, in consequence, the deeds have varied from the instructions of the parties, they have been rectified by a court of equity (o). The same has also been done in instances of mercantile and * other contracts (p). Where two persons intrust a third to draw up minutes of their intention, a mistake of his, may, it has been held, be relieved against (q). Cases of this nature are nearly of kin to those of fraud; it is, in point of conscience and equity, an actual fraud to claim an undue benefit and advantage, from a mere mistake, contrary to the real intention of the contracting parties.

* 1019

Where a party at the time of executing a deed pointed out a mistake, which the other agreed to rectify, but afterwards refused to do so, parol evidence of the fact was held to be admissible, on the ground of fraud (r).

Such evidence, ought not, for obvious reasons, to be allowed to prevail, unless it amount to the *strongest possible proof* (s). The most satisfactory evidence for this purpose

(n) *Shelburne v. Inchiquin*, 1 Bro. C. C. 338. The evidence, however, proved to be insufficient, and no more than 30,000*l.* was ordered to be raised. The decree was affirmed in the House of Lords. See also *Baker v. Paine*, 1 Ves. 457. *Towers v. Moore*, 2 Vern. 98.

(o) *Bartow v. Kilvington*, 9 Ves. 59. *Randal v. Randal*, 2 P. W. 469.

(p) See *Henkle v. Royal Exchange Assurance Comp.* 1 Ves. 317. *Thomas v. Fraser*, 3 Ves. jun. 399. 10 Ves. 227. And see 1 Atk. 545. *Baker v. Paine*, 1 Ves. 456. [13 Mass. Rep. 402.]

(q) 1 Bro. C. C. 350.

(r) Per Ld. Talbot, 1 Bro. C. C. 54. *South Sea Co. v. Otiff*, cited 2 Ves. 376. *Pitcairns v. Ogbourne*, *ibid.* [See *Nelson's Rep.* 7.]

(s) Per Ld. Hardwicke in *Henkle v. the Royal Exchange Assurance Co.* 1 Ves. 318. In that case, upon a bill to rectify a mistake

Serg. & Rawle, 111. See *Christ v. Diffenbach*, 1 *Serg. & Rawle*, 464. *Cozens v. Stevenson*, 5 *ib.* 421. *Ross v. Norvell*, 1 Wash. 14. *Montague & al. v. Smith*, 13 Mass. Rep. 396.

Assuming that a mistake in drawing articles of agreement may be proved by parol, yet in an action of covenant on written articles, the plaintiff cannot prove by parol evidence an agreement different from that on which he has declared. *Barndollar v. Tate*, 1 *Serg. & Rawle*, 160.

A mistake in one writing referring to another may be corrected in a court of equity, by the writing referred to. *Argenbright v. Campbell & ar.* 3 Hen. & Mun. 144. See also *Vance v. Walker*, *ibid.* 288.]

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consists of the written materials and instructions which were intended by the parties to be the basis and ground plan for the construction of the intended instrument (r).

* 1020
To avoid, &c.
Mistake.

Where a mistake was alleged to have been made in * a settlement by an attorney's clerk, the Court would not allow it to be corrected by the mere testimony of the attorney himself, who had received oral instructions for the preparation of the deeds, nothing appearing in the hand-writing of the parties to show that a mistake had been committed (u).

In general, where a written document is given in evidence as containing an admission by the adversary, parol evidence is admissible to explain it, or to show that it originated in mistake (x).

The principle on which evidence is received to explain mistakes in matters of contract between private persons, does not extend to the admission of evidence to show that a mistake or alteration has been made in records; those memorials having been made and kept under the immediate authority of the law, and by officers in whom confidence is for that purpose reposed, it is to be concluded that they have been correctly made, and faithfully preserved (y).

To discharge,
&c.

It is obvious that the general exclusive principle is also

in a policy of insurance, the principal evidence consisting in the deposition of an agent of the Company, who had transacted business for them, the Court held that it was not sufficiently certain to be relied on. *Ld. Hardwicke, C. J.* in that case, observed, that the Court of Chancery had jurisdiction to relieve against plain mistakes in contracts in writing, as well as against fraud, so that if reduced into writing, contrary to the intention of the parties, that, on *proper proof*, would be rectified. *Ld. Eldon, C.* in a subsequent case, observed on the looseness of this expression, as it left it to every judge to say "whether the proof was that *proper proof* which ought to satisfy him."

(t) See *Baker v. Paine*, 1 Ves. 457.

(u) *Hardwood v. Wallis*, cited 2 Ves. 195. Hence it seems that the Court, in such cases, will not rely on mere parol evidence alone. And see the *dictum* of Sir Thomas Clark to that effect. 1 Dickens, 295. And see *Shergold v. Boone*, 13 Ves. 373. 376.

(x) *Holsten v. Jumpson*, 4 Esp. C. 189; and see 1 T. R. 182.

(y) *Reed v. Jackson*, 1 East, 355. In *Hall v. Wiggett*, 2 Vern. 547, an entry in the steward's book, and parol proof by the foreman of the Jury of copyholders, was admitted to show that a feme covert had surrendered the whole of her copyhold estate, although the surrender on the roll, and admission, were but of a moiety. And see *Towers v. Moore*, 2 Vern. 98. Amendments in records are, in numerous instances, made by the Courts themselves on proper application.

inapplicable in all cases where the party admits that the deed or other instrument did once legally exist as such, but offers extrinsic proof to show that it has been discharged by some subsequent instrument * or agreement (y), or by * 1021 the receiving payment or satisfaction (z).

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II. In the next place, extrinsic parol evidence is admissible generally to *give effect* to a written instrument, by *establishing* its authenticity, *applying* it to its proper subject-matter, and also as ancillary to the latter object, for the purpose, in some instances, of explaining expressions used in a peculiar sense, and of annexing customary incidents, and also in other instances, for the purpose of removing *presumptions* arising from extrinsic facts which would otherwise obstruct such application.

To give effect
to a written
instrument.

Whenever an instrument is not proved by mere production, it must necessarily derive its credit and authenticity from extrinsic evidence (a).

To establish,
&c.

In the next place, it is always necessarily a matter of extrinsic evidence to *apply* the terms of an instrument to a particular subject-matter, the existence of which is also matter of proof. A difficulty in this case occurs, where, *although* the terms of the instrument be sufficiently definite and distinct, the objects to which it is to be applied are not equally so, and where it is doubtful whether the description applies at all to the particular object pointed out by the evidence, or whether it be not equally applicable to several distinct objects.

To apply.

The general rule has already been adverted to, that a *latent ambiguity* (that is, an ambiguity arising from extrinsic evidence) may be removed by extrinsic evidence. The illustration most usually given of the operation of this rule is that of a description in a will of a devisee, or of an estate, where it turns out that there are two persons, or two estates, of the same name and description. Where the testatrix devised an estate * to her cousin John Cluer, and there were two persons, father and son, of that name, evidence was admitted to show that John Cluer, the son, was meant (b).

Latent
ambiguity.

* 1022

So in Lord Cheney's case (c), it was held, that if a testa-

(y) *Supra*, tit. *Deed*, 479, *Assumpsit*; & *supra*, 1002, note (s).

(z) *Supra*, *Accord & Satisfaction*.

(a) *Supra*, Vol. I. 327.

(b) *Jones v. Newsam*, 1 Bl. Rep. 60. Yet if there be father and son of the same name, it is usually to be presumed that the father is meant by the name used simply, and without the addition of the younger.

(c) *Lord Cheney's case* 5 Co. 68. b. See also *Careless v. Careless*, 1 Merivale, 354.

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tor, having two sons of the same name of baptism, and supposing the elder, who had long been absent, to be dead, devise his land to his son generally, the younger son may be permitted to prove the intent of the father to devise to him, and to show that, at the time of the devise, he thought that the other son was dead, or that at the time of making his will he named his son John *the younger*, and the writer left out the addition.

According to Lord Coke, no inconvenience can result if an averment be taken in such case, for he who sees the will by which the land is devised cannot be deceived by any secret averment; when he sees the devise to the testator's son generally, he ought, at his peril, to inquire which son the testator intended, which may easily be known by him who wrote the will, and by others who were privy to the intent; and if no direct proof can be made of his intent, then the devise is void for uncertainty (*d*).

So if a person grant his manor of *S.* generally, and it appear that he has two manors of *S.* (south *S.* and north *S.*), parol evidence is admissible to show which was intended (*e*).

Where the testator gave 100*l.* to the four children of Mrs. Bamfield, and it appeared that she had four children by Mr. Bamfield, her latter husband, and two children by Mr. P. her first husband, a declaration by * the testator that he had provided for the four children of Mrs. B., but would give nothing to P.'s children, was admitted in evidence to show who were meant by the description of the four children in the will (*f*).

So if a man, having two manors of the same name, levy a fine of one, without distinguishing which, parol evidence is admissible to show which was meant (*g*).

Parol evidence is admissible for the purpose of raising such an ambiguity (*h*). And in the case of a will, &c. the declarations made by the testator *at the time* of making the will are admissible in order to explain an ambiguity of this nature (*i*).

(*d*) 5 Co. 68.

(*e*) Bac. El. Rule 23.

(*f*) *Hampshire v. Pearce*, 2 Ves. 216; and note, that in the same will, the testator having subsequently given 300*l.* to the children of Mrs. B. Sir John Strange, the Master of the Rolls, held that the declaration was inadmissible as to the 300*l.* being contradictory of the will.

(*g*) *Partridge v. Strange*, Plowd. 85. b. *Meres v. Ansell*, 3 Wilson, 376.

(*h*) 6 T. R. 671; 1 Bro. C. C. 85. 342. 350.

(*i*) *Thomas v. Thomas*, 6 T. R. 671.

Where the testator devised to his grand-daughter, *Mary Thomas* of *Llechloyd*, and it appeared that he had a grand-daughter of the name of *Ellenor Evans*, at *Llechloyd*, and a great grand-daughter *Mary Thomas*, who lived elsewhere, evidence on the part of *Ellenor Evans* was admitted to prove, that when the will was read over to the testator he said that there was a mistake in the name of the woman to whom he intended to give the house (*k*), but that there was no occasion to alter it, as the place of abode and the parish would be sufficient. But in the same case it was held that evidence was properly rejected of declarations made by the testator at *other times* previous to the making * of his will, of his great regard for the defendant *Mary Thomas*, and of his intention to give the house to her. * 1024

PART
IV.Latent
ambiguity.

As an ambiguity arising from too great generality of description may be removed by oral evidence, which restrains and confines, and applies that description to a single object, although on the mere comparison of the terms with several objects, they may be equally applicable to more than one; so it is a rule that a redundant and superfluous description, which is inapplicable to an object *well ascertained* by previous or subsequent description, will not prevent such application. Thus, where property was given to *A.* and *B.* legitimate children of *C. D.* it was held that *A.* and *B.* the illegitimate children of *C. D.* were entitled to take (*l*). So if a grant be made to *William*, bishop of *Norwich*, the name of the bishop being *Richard*, the grant will be good, the intention being sufficiently clear and apparent (*m*). So if a devise be made to *John*, the son of *J. S.* and *J. S.* has but one son whose name is *James* (*n*).

Upon the same principles, if the description in the instrument apply *partially* to each of two persons, but to

(*k*) Ibid. by Lawrence, J. at the trial; the admission of the evidence was afterwards approved of by the Court of K. B. And see 8 Vin. Ab. 312. pl. 29; 2 Ves. 216.

(*l*) *Standen v. Standen*, 2 Ves. Jr. 589; see 2 Pothier, by Sir D. Evans, 210. Where a woman made a will, in favour of a person whom she described to be her husband, and it appeared that he had another wife, Arden, Master of the Rolls, held that the disposition was void, but this was founded not on any defect in the description, but on the principle, that where a legacy is given to a person in character, which he has falsely assumed, and which alone can be supposed to be the motive of the bounty, the law will not permit him to avail himself of it.

(*) Co. Litt. and Evans's Pothier. Vol. II. 209.

(*n*) *Dousett v. Sweet*, Amb. 175. *Bradwin v. Harpur*, Amb. 374. See also *Parsons v. Parsons*, 1 Ves. Jr. 166. *Fonnereau v. Pointz*, 1 Bro. C. C. 472.

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guity.

neither of them entirely, so that a doubt arises which was intended, oral evidence is admissible to * remove it. For as an erroneous and superfluous description will not prevent the application of the description which in part is certain, and as a description equally applicable to two objects may be ascertained and fixed by external evidence, it seems to follow, that where the description, although redundant, and partially erroneous, is still limited to two or more objects, to whom it is equally applicable, then the generality may be further limited by means of extrinsic evidence (o). And it is a general rule that difficulties arising in the application of the terms of a will from imperfection in the terms of description, either of the party to whom the estate is given, or of the estate, may be removed by the aid of extrinsic evidence, even although no part of the description be perfectly correct. One of the strongest instances to this effect is the case of *Beaumont v. Fell* (p). A will was made in favour of *Catherine Eardley*, and evidence was allowed to show that *Gertrude Yardley* was the person meant; no such person as *Catharine Eardley* appearing to claim the legacy. Evidence was admitted to prove that the testator's voice when he made his will was very low, and scarcely intelligible; that the testator usually called *Gertrude Yardley* by the name of *Gatty*, which the scrivener who made the will might easily mistake for *Katy*; and that the testator referred the scrivener to his wife for the name of the legatee, and she afterwards declared that *Gertrude Yardley* was the person intended.

Where the testator gave a legacy to *John and Benedict*, sons of *John Sweet*, and *John Sweet* the father had two sons only, viz. *James and Benedict*, evidence was admitted * 1026 to prove that the testator used to address * *James Sweet* by the name of "*Jackey*" (q). Where a legacy was given in moieties, one to *Ann*, the daughter of *Mary Bradwin*, the other to the children of *Mary Bradwin*, another daughter of the first-named *Mary Bradwin*, and it appeared that when the will was made *Ann Bradwin* was dead, having left two children, but that *Mary Bradwin* the daughter was living, and single, the Master of the Rolls held that evidence was admissible to explain the legacy (r).

(o) See the case of *Thomas v. Thomas*, 6 T. R. 671, above cited.

(p) 2 P. Wms. 141. See also *Ld. Thurlow's dictum in Maybank v. Brooks*, 1 Bro. C. C. 85. And see *Brown v. Langley*, 2 Barn. 18.

(q) *Douset v. Sweet*, Ambl. 175; and see 1 Bro. C. 31. 85. See also *Masters v. Masters*, 1 P. W. 421.

(r) *Bradwin v. Harpur*, Ambl. 374.

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In general, where there is any doubt as to the extent of the subject devised by will, of demised or sold, it is matter of extrinsic evidence to show what is included under the description as parcel of it (s) (1). The question being, whether a description in a lease (*inter alia*) of a piece of ground, late in the occupation of *A.* (the piece of ground being a yard, then in the occupation of *A.*) a cellar and certain wine vaults under it, passed, evidence was admitted to prove, that at the time of the lease the cellar and vaults were not in the occupation of *A.* but were under lease to *B.* another tenant of the lessor, and that the

(s) *Doe v. Burt*, 1 T. R. 701. Buller, J. said, whether parcel or not of the thing demised, is always matter of evidence. See *Kearslake v. White*, 2 Starkie's C. 506, where it was held, that the demise of a messuage, with all rooms and chambers thereto belonging and appertaining, included all that was occupied together as the entire messuage at one and the same time, and that the demise did not include a room which had once formed part of the messuage, but which had been separated from it for many years anterior to the demise. See also *Beaumont v. Field*, 1 B. & A. 247. *Herbert v. Reid*, 16 Ves. 481.

(1) [In trover for the sails of a vessel, brought by the owner of the vessel against the vendee of an officer who was directed by the precept to sell her "together with her tackle, apparel and furniture, or so much thereof as might be necessary, the same being in his custody and possession," and who returned that he sold the vessel, "her tackle, apparel, &c." to *A.* for a certain sum; it was held that it might be shown that the sails were in *A.*'s possession, at the time of the inventory and sale, and were expressly excepted at the time of sale, and not sold. *Dolan v. Briggs*, 4 Binney, 496. But parol evidence is not admissible to prove that part of the premises, included in a deed, was not intended to be so included. *Jackson v. Croy*, 12 Johns. 427. *S. P. Barret v. Barret*, 4 Desaus. 447. *Lessee of Snyder v. Snyder*, 6 Binney, 483: (Unless in case of fraud. See 2 Dallas, 172. 1 Yeates, 140. 4 ib. 281. 1 Binney, 616.) Nor to show that a deed, stating a course for 36 chains, was intended to express 29. *Jackson v. Bowen*, 1 Caines' Rep. 358. (See cases collected by the reporter, in his note to that case, 2d edition.) Nor to explain what land was intended to be conveyed by a deed, which describes the land by courses and distances. *Hamilton v. Cawood*, 3 Har. & M'Hen. 437.

Where the courses, distances and lines are found to correspond with the deed, parol evidence is not admissible to show that any other was intended. *Milling v. Crankfield*, 1 M'Cord, 261. But where there was a plain mistake in a deed, such evidence was admitted to explain the situation of the land, though contrary to the description in the deed. *White v. Eagar*, 1 Bay, 247. *Middleton v. Perry*, 2 Bay, 539. See also *Francois v. Hazlerig*, 1 Marsh. 96. *Marshall & ux. v. Currie*, 4 Cranch, 172. *Baker v. Seabright*, 1 Hen. & Mun. 177. *Dinkle v. Marshall*, 3 Binney, 587. *Pattin & al. v. Goldsborough*, 9 Serg. & Rawle, 47. *Richardson v. Lessee of Stewart*, 2 ib. 84.]

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defendant never claimed them until the expiration of B.'s lease. But where a subject-matter exists, which satisfies the terms of the will, and to which they are perfectly applicable, there is no latent ambiguity; and no evidence can be admitted for the purpose of applying the terms to a * different object (t). In the case of *Doe d. Sir A. Chester v. Oxenden* (u), the question was, whether parol evidence could be admitted to show that the testator, by a devise of his estate at Ashton, intended to devise all his maternal estate, consisting of two manors in the parish of Ashton, and one in the adjoining parish, the court, after hearing two arguments, decided against the evidence. Sir J. Mansfield, C. J. in giving judgment, referred to the cases of *Beamont v. Fell* (x), and *Dowset v. Sweet* (y), and distinguished the present case, on the ground that in those *the will would have had no operation unless the evidence had been received*; whereas in the present the will would have an *effective operation to pass all the estate within the parish of Ashton*, without the evidence proposed; that in the other

(t) See *Lord Walpole v. Lord Cholmondeley*, 7 T. R. 138, and the observations of Sir D. Evans, 2 Evans's Pothier, 210.

(u) 3 Taunt. 147.

(x) 2 P. Wms. 140, and also to the case of *Whitbread v. May*, 2 Bos. & Pull. 593, where the question was as to the effect of a codicil, by which the testator revoked a former general devise of all his estates, so far as it related to his estate at Leeshill in the county of Wilts, and *Hearne* and Buckband, in the county of Kent. The testator had lands in *Hearne*, and several other parishes, all of which he had purchased by one contract from one person; evidence was offered to show that the testator meant to revoke the devise, not only as to the lands in the parish of *Hearne*, but also as to all the lands in other parishes purchased at the same time; the evidence was received at the trial, subject to the opinion of the Court of C. B. which was equally decided upon the question. A testator having copyhold estates in North C. and South C. devises to his wife all his wines, &c. in addition to the settlement made her on his copyhold estate; to his niece M. the rents and profits of his new enclosed freehold cow-pasture close in North C. during the life of his wife, and after the decease of his wife to two nephews, his furniture, &c. and all his copyhold estates in North C. and South C. It was held, that as there was no ambiguity on the face of the will, or in the application of it, the testator having copyhold estates in North C. and South C. which answered the description, it was held that extrinsic evidence was not admissible to show that the description in the settlement included a freehold close, which was mistakenly enumerated there as copyhold, in order to show that by all his copyhold estates in North C. and South C. this freehold passed, although the settlement was referred to in the will; and that other documents not referred to were inadmissible for that purpose. *Doe d. Brown v. Brown*, 11 East, 441.

(y) Amb. 175. *Supra*, 1025.

cases the evidence was admitted to explain that which otherwise would have had no operation, and that it was safer not to go beyond that line. The same question was afterwards brought before the House of Lords (z), where judgment was given corresponding with that of the Court of Common Pleas (1).

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(z) *Doe d. Oxenden v. Sir A. Chichester*, 4 Dow. 65, in an action brought by the devisee against the heir at law. The question on the admissibility of the evidence having been referred to the judges, Sir V. Gibbs, C. J. of C. B. delivered their unanimous opinion, that the evidence ought not to be admitted. In delivering that opinion, he observed, "The courts of law have been jealous of extrinsic evidence to explain the intention of a testator; and I know only of one case in which it is permitted, that is, where an ambiguity is introduced by extrinsic circumstances. There, from the necessity of the case, extrinsic evidence is admitted to explain the ambiguity. For example, where a testator devises his estate of Blackacre, and has two estates called Blackacre, evidence must be admitted to show which of the Blackacres is meant; so if one devises to his son John Thomas, and he has two sons of that name. So if one devises to his nephew William Smith, and has no nephew answering the description in all respects, evidence must be admitted to show which nephew the testator meant, by a description not strictly applying to any nephew. The ambiguity there arises from an extrinsic fact or circumstance; and the admission of evidence to explain the ambiguity is necessary to give effect to the will; and it is only in such a case that extrinsic evidence can be received. It is of great importance that the admission of extrinsic evidence should be avoided, where it can be done, that a purchaser or heir at law may be able to judge from the instrument itself what lands are or are not to be affected by it. Here the devise is of all the devisor's estate at Ashton, for there is no difference between the words "Estate of Ashton" and "Estate at Ashton," and he has an estate at Ashton which satisfies the description.

(1) [A. by a written contract, agreed to receive of B. sixty shares of the Hudson Bank, on which ten dollars per share had been paid, and to deliver B. his note for 667 dollars, and pay him the balance in cash; and also to pay five per cent. advance: Here is a latent ambiguity, and the nominal value of each share being fifty dollars, parol evidence was held to be admissible to show whether the five per cent. advance was to be paid on the sum paid in on each share only, or on the nominal amount. *Cole v. Wendell*, 8 Johns. 116. A patent was granted to David H. without any other words of description; parol evidence was admitted to show that Daniel H. and not David H. was the patentee intended. *Jackson v. Stanley*, 10 Johns. 123. *Quare*; and see *Jackson v. Hart*, 12 Johns. 77. *Lucy v. Pusey*, Addison's Rep. 380.

In Pennsylvania, parol evidence was held admissible to prove that a legacy, given to Samuel P., was intended for William P., though there were persons of both names. *Powell v. Biddle*, 2 Dallas, 70. If there be a devise of a lot "on Third Street, in the occupation of J. P.," and the lot lies on Fourth Street, and was in the occupation of J. P., this is a latent ambiguity, and may be ex-

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*In the next place, extrinsic evidence is admissible for the purpose of construing ancient charters, explaining the

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plained by parol evidence. *Allen's Lessee v. Lyons*, Circuit Court, Jan. 1811, Wharton's Digest, 258.

In case of a devise of "the farm which I now occupy," parol evidence was held not to be admissible to show that the testator intended to devise the whole of his real estate at W. including a farm of ninety acres in the tenure of A. under a lease, and that he gave instructions for that purpose to the scrivener who drew the will. *Jackson v. Sill*, 11 Johns. 201. Where the grantor in a deed described the premises as the farm on which he then dwelt, this was held to be a latent ambiguity, which might be explained by evidence *abunde*. *Doolittle & ux. v. Blakesley*, 4 Day, 265. See *Ante*, p. 1013, note (1). Parol evidence was held admissible to show what was meant by a devise of "a tract of land called the Beaver Dam." *Hatch v. Hatch*, 2 Hayw. 32. Where the word *convey* was used in a devise, it was held that parol proof was not admissible to show that the testator intended to give only a life estate, it being, if any ambiguity at all, one apparent on the face of the instrument, which it is the exclusive province of the court to interpret. *Denn v. Cornell*, 3 Johns. Cas. 174. See also *McDermot v. U. States Insurance Co.* 3 Serg. & Rawle, 607. *Duncan v. Duncan*, 2 Yeates, 302. *Stith v. Barnes*, 1 Car. Law Repos. 491. *Duprè v. McDonald*, 4 Desauss. 209. Where a charter-party stipulated that the freighters should pay a certain sum per pound, &c. "British weight," it was held that as the word weight had two meanings, gross and neat, this was such a latent ambiguity as to warrant the introduction of parol testimony. *Goddard v. Bulow*, 1 Nott & McCord, 45. And where the words of a will are susceptible of reference to two objects, viz. a freehold in the lands, or rents which had previously accrued, parol evidence may be admitted to show to which they apply. *Elsworth v. Buckmeyer*, 1 Nott & McCord, 431. The identical monument or boundary referred to in a deed is always a subject of parol evidence: There may be two trees of a similar species and with similar marks; two similar stakes not far distant from each other, or two rivers of the same name; and which was intended by the deed to be settled by parol evidence, on the ground that it is a latent ambiguity. Per Woodbury, J. *Proprietors of Claremont v. Carlton*, 2 N. Hamp. Rep. 373.

In *Peish v. Dickson*, 1 Mason's Rep. 11, Story, J. says he had found himself unsuccessful in every attempt which he had made to reconcile all the decisions upon the subject of latent and patent ambiguities. "The difficulty" he remarks, "lies not in the rule itself, (than which nothing can be clearer) but in applying it to particular cases, where the shades of distinction are very nice. There seems indeed to be an intermediate class of cases, partaking of the nature both of patent and latent ambiguities; and that is, where the words are all sensible and have a settled meaning, but at the same time consistently admit of two interpretations, according to the subject matter in the contemplation of the parties. In such a case, I should think parol evidence might be admitted to show the circumstances under which the contract was made, and the subject matter to which the parties referred. For instance, the word *freight* has several meanings in common parlance; and if by a written contract a party were to assign his freight in a particular ship, it seems

meaning of the terms of contracts, to which a peculiar and technical sense has been annexed, by custom and usage. Also, for the purpose of showing the consequences and incidents, which, by virtue of a known and established custom, are by presumption of law appurtenant to the general terms of a contract.

When it is said that oral evidence shall not be admitted to explain an ambiguity or uncertainty apparent on the instrument, this must be understood of such defects as render the instrument in point of law inoperative; for it is not every species or degree * of doubt or uncertainty which * 1029 may occur upon the reading of an instrument, that will thus wholly avoid it; on the contrary, many difficulties of this nature may be removed by legal construction, acting upon certain settled rules and maxims, and there are some kinds of obscurity and doubt which may be dispelled by the aid of extrinsic evidence, as in the instances of ancient charters and mercantile contracts. In *ancient charters* words are often to be found of doubtful import from their antiquity; the particular terms may have become obscure, or even obsolete; but it would be highly unreasonable, as well as inconvenient, that on this account the whole should perish; the terms were probably understood when the instrument

to me that parol evidence might be admitted of the circumstances, under which the contract was made, to ascertain whether it referred to goods on board of the ship, or an interest in the earnings of the ship; or in other words, to show in which sense the parties intended to use the term." Accordingly, in that case, (which was assumed for a balance alleged to be due on consignments,) parol evidence was received of the circumstances under which a contract was made, which contained this clause relating to the plaintiff's goods, viz. "On which goods Mr. D. [the defendant] has advanced me \$5833, for which amount he will hold for reimbursement on the amount and net proceeds of the sales of said goods, *which are only considered answerable* for said amount advanced, as per our agreement"—for the purpose of showing whether it was intended to waive any personal claim on the plaintiff, and to restrict the defendant's security, for the re-payment of the advance, to the goods only—or was meant merely to exempt the goods of the shippers on freight from being included as a security for the advance on the plaintiff's goods.

Ellsworth, C. J. in a note to *Clarke v. Russel*, 3 Dallas, 421, suggested a distinction in principle between solemn instruments and loose commercial memoranda. "I will, for instance," said he, "state this case;—A. and B. being at a wharf, the former says to the latter, 'I will sell you my ship John.' B. asks an hour to think of the proposition; goes home; and shortly after sends a note to A. in these words—'I will take your ship John.' May not the party go beyond the note, to explain, by existing circumstances, the word *take*, which, according to existing circumstances, will equally embrace a purchase, a charter-party, and a capture?"

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- * 1030 was made; and it is also probable that the usage and practice then conformed, and that they have since continued to conform, with the real meaning and sense of those expressions; and hence such ancient and continuing usage may with reason and prudence be resorted to as the expositors of such doubtful terms (a) and phrases; more especially where the charter concerns the public interests of a large body who would not, it may be presumed, have acquiesced in an illegal interpretation and application of its terms. Such evidence may be considered as somewhat analogous to the practice of the courts, in considering the usage supplied by the precedents as to the construction of a doubtful statute, except that in the latter case the courts themselves notice the contemporaneous and subsequent * construction put upon the statute (b); but in the case of a charter, the usage if not admitted must be ascertained as a fact by a jury.

Such evidence in aid of the construction of a doubtful charter is also founded in part upon considerations of legal policy and convenience, for the purpose of quieting litigation, and supporting long-continued and established usages (c).

In the case of *Withnell v. Gartham* (d), Lawrence, J. observed, "if there be any ambiguity in this deed, usage is admissible to explain it; and the argument of convenience or inconvenience from this or that construction of a deed creates that sort of ambiguity that should be explained by usage." (1)

(a) In the case of *the Attorney General v. Parker* (3 Atk. 576), Lord Hardwicke observed, that in the construction of ancient grants and deeds there is no better way of construing them than by usage, and *contemporanea expositio* is the best way to go by. In *R. Varlo*, (Cowp. 248), Lord Mansfield, supposing the terms of the charter doubtful, the usage is of great force; not that usage can overturn the clear words of a charter; but if they are doubtful, the usage under the charter will tend to explain the meaning of them. Evidence is not admissible to explain the meaning of a statute, as to show what is meant by the word *square* according to the technical usage of the trade. *The Attorney General v. The Plate Glass Co.* 1 Anst. 39.

Where a contract is for so many bushels of corn, statutory bushels must be intended. 1 Chitty's Rep. 28.

(b) See 1 T. R. 728.

(c) See the observations of Buller, J. 3 T. R. 288.

(d) 6 T. R. 388.

(1) [In patents of great antiquity, where the description of the land is vague, and the construction somewhat doubtful, the acts of the parties, the acts of government, and of those claiming under adjoining patents, are entitled to great weight in the location of the grant. *Jackson v. Wood*, 13 Johns. 346.]

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In the case of *The King v. Osbourn* (f), by the terms of the charter the power of electing aldermen was committed to the mayor and *commonalty*. According to the *usage*, the term *commonalty* included aldermen; and the court were of that opinion, and construed the charter accordingly (g). Usage was, on the same principle, admitted as explanatory evidence as to the mode of presentation, where a presentation to a curacy had been given by deed ninety years before to the *parishioners* and *inhabitants* of Clerkewell (h). Also, in order to show that an act, which by the terms of a charter was committed to the mayor, aldermen and burgesses, or the greater part of them, was well executed by the majority present at a regular * meeting, although not by a majority of the whole number (i); that a presentation given by a charter to the mayor, aldermen and burgesses, was properly executed by the mayor and aldermen only (k); that the justices of a county have a concurrent jurisdiction with the justices of a borough (l), under the particular charter; again, where the power of appointing a schoolmaster was given to the minister and churchwardens, to show that an appointment by the minister and a majority of the churchwardens is good (m).

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Where, however, the terms of an ancient charter are not in themselves doubtful, either from the use of equivocal and obscure terms, or in point of legal construction, evidence of usage can no longer avail; its legitimate ob-

(f) 4 East, 327.

(g) Lord Ellenborough said, that without resorting to any assistance from contemporaneous and subsequently continuing usage (to which, however, in such cases, upon the best authorities in the law, resort may allowably be had), on the face of the charter itself, by a fair construction of it, *commonalty* does include aldermen.

(h) *Attorney General v. Parker*, 3 Atk. 576.

(i) *R. v. Varlo*, Cowp. 248. But as to the decision in this case, *vid. infra*, 1032, note (n).

(k) *Gape v. Handley*, 3 T. R. 288, n.

(l) *Blankley v. Winstanley*, 3 T. R. 279. Note, Buller, J. observed, that "Usage consistent with the charter has prevailed for 190 years past; and if the words of the charter were more disputable than they are, I think that ought to govern the case. There are cases in which the Court has held that settled usage would go a great way to control the words of a charter; and it is for the sake of quieting corporations that this Court has always upheld long usage, where it was possible, though recent usage would perhaps not have much weight."

(m) *Withnell v. Gartham*, 6 T. R. 388.

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ject is to remove doubts; its functions therefore cease where no doubt exists; and to admit it in such a case would be not to obviate, but to create, doubts (*a*).

- * 1032 Where a statute constituted a body of 48, with power, in conjunction with certain others, to do corporate acts in the town of Northampton, it was held that an usage of 300 years continuance was unavailable to show that the attendance of a majority of 48 was not requisite, the general question having been already settled, that where such powers are delegated to a * definite body, the attendance of a majority of that body is essential (*n*).

To decide whether the construction of a charter be so doubtful as to admit of explanation from usage, or whether, on the other hand, the terms be so intelligible in their usual plain and ordinary natural sense, or by necessary construction of law, with reference to antecedent decisions, is obviously a pure question of law (*o*). The ambiguity, to require such aid, must clearly be such as arises upon reading the instrument itself, independently of any extrinsic considerations; and unless a doubt arise from that source, usage can avail nothing; for if it be consistent with the legal construction of the deed, it is unimportant; if it be contrary to such construction, to admit it would be, not to explain, but to subvert, an authentic instrument by the aid of presumption and opinion.

- Private deeds. The doctrine of applying evidence of contemporaneous usage to the construction of ancient deeds, has, it appears, been applied to *private* as well as to *public* instruments (*p*) (1); but it is obvious that the reasons for * al-

* * 1033

(*a*) However general the words of ancient deeds may be, they are to be construed, as Lord Coke says, by evidence of the manner in which they have been possessed and used. *per* Ld. Ellenborough in *Weld v. Hornby*, 7 East, 199.

(*n*) *R. v. Miller*, 6 T. R. 268; and see *R. v. Bellringer*, 4 T. R. 810. There the charter of Bodmin gave power to a definite body, which was exercised by a majority of the subsisting body, but not by a majority of the definite number. Usage was alleged to show that a majority of the definite number was essential; but the Court declined to decide upon the validity of the usage alleged, being of opinion, upon the construction of the charter, and without reference to usage, that a majority of the whole definite body was requisite.

(*o*) See the observations of Sir D. Evans on this head; 2 Evans's Pothier, 219, & *sequent*.

(*p*) In the case of *Cooke v. Booth*, (Cowp. 819), the doctrine was extended to a subject of a nature merely private. A lease contained

(1) [Where the grantor, in a deed executed in 1694, gave to the grantee the privilege of cutting timber, to be used for building on

lowing it in the former case apply with much less force, if they can be applied at all, in the latter, inasmuch as the mere assent and acquiescence of a private person, who may have been ignorant of his rights, affords a presumption very inferior in weight to that which is to be derived from the long-established practice and usage of a public body. The application of this principle to the case of private instruments has, however, been denied in two instances (q) in equity; and it seems to be very problematical whether such evidence would now be received in a court of law.

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Where terms are used which are known and understood by a particular class of persons, in a certain special and peculiar sense, evidence to that effect is admissible for the purpose of applying the instrument to its proper subject-matter; and the case seems to fall within the same consideration as if the parties in framing their contract had

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ed a covenant of renewal; the question was, whether by the terms of the covenant, each subsequent lease was to contain a similar covenant; and as there had been several successive renewals, with similar covenants, the Court held that the parties by their practice had put their own construction on the covenant, and were bound by it. [See *Cortelyou v. Van Brundt*, 2 Johns. 357.]

(q) 3 Ves. 298. 6 Ves. 237. In the case of *Iggulden v. May*, in error, 2 N. R. 449; Mansfield, C. J. in giving judgment, observed upon the case of *Cook v. Booth*, "we think that was the first time that the acts of the parties to a deed were ever made use of in a court of law to assist the construction of that deed." S. C. 7 East, 237; *Infra*, 1700. In *Hughes v. Gordon*, 1 Bligh, 289, it was said that evidence to explain a deed was highly dangerous, except in cases of fraud or misrepresentation. See *Clinan v. Cooke*, 1 Sch. & Lef. 22; *Stammers v. Dixon*, 7 East, 200; Post. tit. *Wills*. [9 Ves. 325.]

Where letters are written in so dubious a manner as to be capable of different constructions, or be unintelligible, without the aid of extrinsic circumstances, their meaning becomes a question of fact for the Jury, and parol evidence of such extrinsic facts is admissible. As in the case of libels, threatening letters, or a letter offered in evidence to prove acknowledgments to take a case out of the stat. of limitations. But if they cannot be explained by extrinsic circumstances, then, like deeds or agreements, their construction is matter of law for the Court; per Buller, J. 1 T. R. 182; *supra*, Part iii., tit. *Law and Fact*, p. 429. [See *South Carolina Society v. Johnson*, 1 M'Cord, 41.]

the premises conveyed, from the words of the grantor; evidence that the grantee and his heirs, &c., with the knowledge of the grantor, his heirs, &c., had cut wood for the purpose of erecting fences on the premises, is admissible to show the intention of the parties to apply the word "building" to the making of fences, as well as to the erection of houses and barns. *Livingston v. Ten Broeck*, 16 Johns. 14.]

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made use of a foreign language, which the Courts are not bound to understand. Such an instrument is not on that account void; it is certain and definite for all legal purposes, because it can be made so in evidence through the medium of an interpreter. Conformably with these principles, the Courts have long allowed mercantile instruments to be expounded according to the usage and custom of merchants, who have a style and language peculiar to themselves, of which, usage and custom are the legitimate interpreters (r).

* 1034 Thus a general warranty in a policy of insurance to depart with convoy, may be proved according to mercantile usage and understanding, to be satisfied by a joining of convoy at the nearest usual place of rendezvous (s) (1).

So where upon the sale of a cargo, the vendor covenanted to pay all duties, *allowances*, &c. to be taken out of them, he was permitted to adduce proof of a custom, to show that such allowances were to be limited (t) to the price which he should receive.

Where it was stipulated in a charter-party that the captain should receive a stipulated sum in lieu of *privilege* and *primage*, and the question was, whether the terms of the

(r) See the cases cited below. Also *Syers v. Bridge*, Doug. 527. *Chaurand v. Angerstein*, Peake's C. 43. *Uhde v. Walters*, 3 Camp. 16. *Birch v. Depeyster*, 1 Starkie's C. 210. [4 Camp. 385. S. C.] *Edie v. East India Company*, 2 Burr. 1216. 1 Ves. 459. 2 B. & P. 16. 7-East. 237. [*Stultz v. Dickey*, 5 Binney, 287.]

(s) *Lethulier's case*, 2 Salk. 443. See also *Cutter v. Powell*, 6 T. R. 320. *Noble v. Kennoway*, Doug. 510. In *Robertson v. French*, 4 East, 130, Lord Ellenborough observed, that the same rules which applied to all other instruments applied also to a policy of insurance, that is, to be construed according to its sense and meaning, as collected, in the first place, from the terms used in it, which are to be understood in their plain, ordinary and popular sense, unless they have generally in respect of the subject, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the word. See also *Ld. Eldon's* observations on the subject in *Anderson v. Pitcher*, 2 B. & P. 164; and *Evans's Pothier*, Vol. 2, p. 214. *Salvador v. Hopkins*, 3 Burr. 1707. *Baker v. Paine*, 1 Ves. 459. *Ford v. Hopkins*, Salk. 283. [See *Harris v. Nicholas*, 5 Munf. 483.]

(t) *Baker v. Paine*, 1 Ves. 459. *Ibid.* 317. See 6 Ves. 336, n. *Elkins v. Maclish*, Amb. 186. *Ford v. Hopkins*, Salk. 283. *Henkle v. Royal Exchange Assurance Company*, 1 Ves. 318. *Thomas v. Fraser*, 3 Ves. jun. 309. 10 Ves. 227. And see 1 Atk. 545.

(1) [Parol evidence is not admissible to show that by the term "specie," in a policy of insurance, certain paper bills were intended by the underwriters. *Benzet v. McClenachan*, cited 2 Dallas, 173.]

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contract excluded all right on the part of the captain to use the cabin for the carriage of goods on his own account, Gibbs, C. J. said, evidence may be received to show the sense in which the mercantile part of the nation use the term *privilege*, just as you would look into a dictionary to ascertain the meaning of a word; and it must be taken to have been used by the parties in its mercantile and established sense (u).

* In the case of *Cutter v. Powell*, where a promissory note was given to a sailor, to be paid, provided he served on board the ship as second mate during the voyage, and he died before the completion of the voyage, the Court, deciding upon the terms of the contract, held that his administrator was not entitled to recover *pro rata* for the time during which he served; but it appears from the language of the Court in that case, that if a custom could have been established that such notes were in general use, and that the commercial world would have acted upon them in a different sense, they would have decided differently (x).

It is to be observed, that it has been questioned by the highest authorities, whether the practice of construing mercantile documents by usage has not been carried too far.

In the case of *Anderson v. Pitcher* (y), Ld. Eldon observed, "It is now too late to say that this warranty (in a policy of insurance) is not to be expounded with due regard to the usage of trade; perhaps it is to be lamented that in policies of insurance parties should not be left to express their own meaning by the terms of the instrument. This seems to have been the opinion of that great Judge Ld. Holt. (z). It is true, * indeed, that Ld. Mansfield, who * 1036 may be considered the establisher, if not the author, of

(u) *Birch v. Depeyster*, 1 Starkie's C. 210. [4 Camp. 385. S. C.] And note, that in that case the same learned Judge admitted evidence of a conversation between the parties, to show in what sense they used the term. He said, he thought such evidence fell within the general current of mercantile understanding; since, if the term had been used in different trades in different ways, the conversation was evidence to show in what sense it was used on that occasion.

A Jury may properly judge of the meaning of mercantile phrases in the letters of merchants. *P. C. Lucas v. Groning*, 7 Taunt. 164.

(x) *Cutter v. Powell*, 6 T. R. 320.

(y) 2 B. & P. 164. The question in that case was as to the meaning of a warranty (contained in a policy) to depart with convoy; and it was held that it was not complied with unless sailing instructions be obtained before the ship leaves the place of rendezvous, if by due diligence they can be obtained.

(z) *Lethbridge's case*, 2 Salk. 443.

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great part of this law, expressed himself thus, "whenever you render additional words necessary, and multiply them (a), you also multiply doubts and criticisms." Whether, however, it be not true, that as much subtlety is raised by the application of usage to the construction of a contract, as by the introduction of additional words, might, if the matter were *res integra*, be reasonably questioned."

The legitimate object of extrinsic evidence in such cases, as consistent with general principles, seems to be to explain terms, (in order to their due application,) which are not intelligible to all who may understand the language, but which nevertheless have acquired, by virtue of habit, custom and usage, a known definite sense and meaning amongst a particular class of persons, which can be well ascertained by means of the extrinsic testimony of those who are conversant with the peculiar use of those terms. The witnesses for this purpose, may be considered to be the sworn interpreters of the mercantile language in which the contract is written. Beyond this, however, the principle does not extend; merchants are not prohibited from annexing what weight and value they please to words and tokens of their own peculiar coinage, as may best suit their own purposes, but they ought not to be permitted to alter and corrupt the sterling language of the realm. If they use plain and ordinary terms and expressions, to which a natural and unequivocal meaning belongs, which is intelligible to all, then, it seems, according to the great principle so frequently adverted to, that plain sense and meaning ought not to be altered by evidence of a mercantile understanding and usage to the contrary. It is clear, indeed, that if a contrary * practice were to prevail, and be carried to its full extent, the effect would nearly be to annihilate special contracts in mercantile affairs, and to compel all persons, under all circumstances, to conform with the usages of trade; the written contract would become a dead letter; the question would not be, what is the actual contract, but what is the usage; and the very same terms would denote different contracts as often as mercantile fashions varied. In short, the *jus et norma loquendi*, in a legal sense, would become wholly dependent on the usages of trade.

* 1037

Where a policy of insurance (in the common form) expressed "that the insurance on the said ship shall continue until she is moored 24 hours, and on the goods till safely landed," the court of King's Bench held that evidence of an

(a) *Lilly v. Ever*, Dougl. 74.

usage, that the risk on the goods as well as the ship expired in 24 hours (b), was inadmissible.

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Where the vendor of a quantity of bacon warranted * it to be of a particular quality, it was held that the vendee could not give evidence of a custom in the trade, that the buyer was bound to reject the contract if he was dissatisfied with it at the time of examining the commodity (c), and Heath, J. who tried the cause, said that it would breed endless confusion in the contracts of mankind if custom could avail in such a case.

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So where words have a *known legal meaning* which belongs to them, evidence is not admissible to show that the parties intended to use them in a different sense, according to the custom of the country (d) (1).

In many instances extrinsic evidence of custom and usage is admissible for the purpose of annexing incidents to the terms of a written instrument concerning which the instrument is silent. The principle upon which such evidence is admissible seems to be a reasonable presumption that the parties did not express the whole of their intention, but meant to be guided by custom as to such particulars as are generally known to be annexed by custom

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(b) *Parkinson v. Collier*, Park on Ins. 314. *Yeates v. Pym*, 2 Marsh. Rep. 141. 6 Taunt. 446. 1 Holt's C. 95. The practice of construing mercantile instruments according to the custom of trade, was carried to a great length in the case of *Donaldson v. Forster* (Sittings after Mich. Term, 29 Geo. III. Abbott's Law of Shipp. 213). There, by the terms of the charter-party, it was stipulated that the merchant should have the exclusive use of the ship outwards, and the exclusive privilege of the cabin, the master not being allowed to take any passengers. The defendants insisted, that under a charter-party so worded, it was the constant usage of trade to allow the master to take out a few articles for a private trade. Lord Kenyon admitted evidence to be given to prove this usage, observing, that although *prima facie* the deed excluded this privilege, yet he thought the deed might be explained by uniform and constant usage, the usage being a tacit exception out of the deed. Notwithstanding this high authority, sanctioned as it has, in some measure, been by its adoption and insertion in the very learned work from which it is cited, some doubt may perhaps still be entertained whether the receiving such evidence be strictly warranted in principle. See Sir D. Evans's remarks in his edition of Pothier, Vol. II. p. 215.

(c) *Yeates v. Pim*, Holt's C. 95.

(d) *Supra*, 527; and see *Doe v. Benson*, 4 B. & A. 588.

(1) [See *Frith v. Barker*, 2 Johns. 327. *Sleight v. Rhineland*, 1 Johns. 192. *Thompson v. Ashton*, 14 Johns. 316. *Stoecker v. Whitman*, 6 Binney, 417. *Henry v. Risk & al.* 1 Dallas, 265. *Homer v. Dorr*, 10 Mass. Rep. 26; and tit. *Custom*, Vol. II.]

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and usage to similar dealings. It is evident that in commercial affairs, and all the other usual and common transactions of life, it would be attended with great inconvenience that the well-known ordinary practice and usage on the subject should not be tacitly annexed, by virtue of such a presumption, to the terms of a contract, and that the parties should either be deprived of the certainty and advantage to be derived from the known course of dealing, or be placed under the necessity of laboriously specifying in their contracts by what particular usages they meant to be bound (o).

- * 1039 It is unnecessary to allude to the numerous instances in which, upon the same principle, the law itself annexes * its own terms to a contract. If a contract for the sale of goods be silent as to the time of delivery, the law annexes the term that they shall be delivered within a reasonable time. A bill of exchange is payable at a certain day; but the law allows three additional days of grace, concerning which the instrument is silent. The instance of a bill of exchange is also a strong one to show how far custom operates to annex terms not expressed in the instrument (1).

It would be superfluous to specify how many terms and conditions, which are not expressed on the face of a bill of exchange, are annexed to it by the custom of merchants, as necessary and inseparable incidents.² The operation of this presumption is not confined to mercantile instruments.

It has been held that a tenant might avail himself of a local custom to take a way-going crop after the expiration of his term under a lease; for the custom did not alter or contradict the terms of the lease, but merely superadded a right consequential to the taking (e).

Upon the same principle, evidence was admitted to show that a heriot was due on the death of the tenant for life, although that duty was not expressed in the lease (f).

(o) Evidence of an usage at the Navy Office to pay bills indorsed by an attorney in his own name, and negotiated by him under a power, cannot be received for the purpose of enlarging the terms of the power. *Hogg v. Snaith*, 1 Taunt. 347.

(e) *Wigglesworth v. Dallison*, Doug. 201.

(f) Per cur. *White v. Sayer*, Palm. 211.

(1) [In Massachusetts, the usages of banks, at which the parties to a note have been accustomed to transact business, are recognized by the courts, not as rules of decision, but as evidence of the assent of the parties to such usages, which may vary the terms annexed to their contracts by general mercantile custom. *Blanchard v. Hilliard*, 11 Mass. Rep. 85. *Jones v. Fales*, 4 ib. 245. *Lincoln & Kennebeck Bank v. Page*, 9 ib. 155. *Peirce v. Butler*, 14 ib. 303. *Whitwell & al. v. Johnson*, 17 ib. 449.]

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tomary inci-
dents.

So it has been held that a custom for an away-going tenant to provide work and labour, tillage and sowing, and all materials for the same, in his away-going year, the landlord making him a reasonable compensation, is not excluded by an express written agreement between the landlord and tenant, which is consistent with such a custom (g).

The presumption necessarily ceases where it can be collected, from the terms of the instrument, that it was contrary to the intention of the contracting parties, in the particular instance, to be guided by the custom: as where the parties have actually expressed an intention different from the custom, for then, according to the general rule of law, *expressum facit cessare tacitum*; or even where a contrary intention may be inferred from the terms of the contract. Thus, where the lease specified certain payments to be made by the in-coming to the out-going tenant at the time of quitting, but specified no payment for foldage, it was held that this agreement excluded the operation of a custom for the in-coming tenant to pay to the out-going tenant an allowance for foldage (h). * 1040

It is a general rule, that oral and extrinsic evidence is admissible to rebut a presumption raised by extrinsic evidence. Here the evidence is not offered as a substitute for written evidence, but to remove an impediment which would otherwise have obstructed or altered its operation (i) (1). Thus, it has been held that parol evidence is admissible to show that a legacy was not intended in satisfaction of a debt (k), or that the testator, although he gave the executor a legacy, intended that he should have the surplus (l). So where the consor of a fine dies before the

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(g) *Senior v. Armitage*, Holt's C. 197.

(h) *Webb v. Plummer*, 2 B. & A. 746.

(i) 2 Atk. 69. 99. Amb. 126. 2 Vern. 252.

(k) *Cuthbert v. Peacock*, 2 Vern. 503. But see *Fowler v. Fowler*, 3 P. Wms. 353; where an allowance of pin-money being in arrear to the wife for two years, Talbot, C. would not admit evidence to show the intention of the testator that she should have a legacy of 500*l.* in addition to the arrears.

(l) 2 Vern. 252. 648. *Wingfield v. Alkinson*, 2 Vern. 673. 2 P. W. 158. 9 Mod. 9. 1 Str. 568. So where the wife was executrix, and real and personal property were left to her by her hus-

(1) [S. P. Mann v. Mann, 14 Johns. 1. 1 Johns. Ch. Rep. 233. Steere v. Steere, 5 Johns. Ch. Rep. 1. Davenport v. Mason, 15 Mass. Rep. 85. Eustace v. Gaskins, 1 Wash. 190. Payne's Ex'r. v. Dudley, ibid. 198. Bigger's Adm'r. v. Alderson, 1 Hen. & Mun. 54. Nelson v. Carrington, 4 Munf. 332.]

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uses are declared, the presumption that the fine was levied to the use of the conusor may be rebutted by evidence (m).

* So oral evidence has been admitted by courts of equity to show that a portion advanced to a child subsequent to the making of a will, and of the same amount with the legacy, was not intended as an ademption of a legacy (n); and for this purpose, and to show the real intention, even oral declarations are admissible (o).

In the case even of a devise of lands, it has been held that the legal implication, as to the revocation of the will, founded upon the subsequent marriage of the testator, and birth of a child, may be rebutted by parol evidence (p).

band. *Lake v. Lake*, 1 Wils. 313. Amb. 126. Per Buller, J. Doug. 40. 2 Atk. 69. An executor is not excluded from proof of the testator's intention that he should take the surplus, by the circumstance of his taking a reversionary contingent interest. *Lynn v. Beaver*, 1 Turn. 63. Such evidence, however, is admissible only for the purpose of supporting the apparent effect of an instrument; it is inadmissible to show that a legacy in a second will was intended as an ademption of a legacy given by the former will. *Hurst v. Beach*, 5 Madd. 360.

(m) *Roe v. Popham*, Doug. 24. *Lord Altham v. Lord Anglesea*, Gilb. Eq. R. 16.

(n) *Debeze v. Man*, 2 Bro. C. C. 165. *Coote v. Boyd*, 2 Bro. C. C. 521. Or, as it seems, to show that such advancement was intended as an ademption (*Rosewell v. Bennett*, 3 Atk. 77). But note, that the intention of the legacy was specified in the will; and the case was not decided on that ground. See also *Hosley v. Hatton*, 1 Ves. jun. 390.

(o) *Ellison v. Cookson*, 1 Ves. jun. 100. *Clinton v. Hooper*, 1 Ves. jun. 173. But those made at the time of the will are the most important. *Trimmer v. Bayne*, 7 Ves. 508.

(p) *Brady v. Cubitt*, Doug. 30. See the observations on this case in *Goodtitle v. Ohoay*, 2 H. B. 516. For the cases in which an alteration in circumstances amounts to an implied revocation of a will, see Bac. Ab. tit. *Wills and Testaments*, 363, 6th edit. *Brown v. Thomson*, 1 P. Wms. 304. n. *Lugg v. Lugg*, 1 Ld. Raym. 441. *Shepherd v. Shepherd*, Doug. 37. n.

Sir D. Evans observes, that "the allowing a written instrument to derive a construction different from that which it would naturally import, in consequence, not of any relative character of the subject-matter, but of verbal declarations, cannot, on principle, be reconciled with the general tenor of our jurisprudence." It is impossible not to regret, in common with that learned writer, that in any branch of cases, particularly one so important as the present, the uncertainty and vagueness of oral testimony, of the very weakest and loosest description, should be in effect substituted for the certainty of a written document. The practice involves an inconsistency of considerable magnitude. If the extrinsic circumstances be so powerful as to create a stronger presumption as to the intention of the party, than that which arises from his own written exposition of that intention (which still remains uncanceled), how

Lord Mansfield observed, "I am clear * that this presumption, like all others, may be rebutted by every sort of evidence. There is a technical phrase for it in the case of executors; it is called rebutting an equity." And Mr. J. Buller said that implied revocations must depend on the circumstances at the time of the testator's death.

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But, although such evidence be admissible to rebut a presumption arising from the operation of matter in *pais* as to the *intention* of the party to revoke, it is otherwise where the revocation is by act of law, where the law pronounces upon a presumption *juris et de jure* (q), that is where the presumption of law is so violent that it does not admit circumstances to be set up to repel it (r). Thus, where a testator devised his lands to B. and afterwards, upon his marriage, conveyed them by lease and release to trustees, to other uses, with the usual limitations in marriage settlements, the court, on a trial at bar, refused to hear parol evidence to show that the deviser meant that his will should remain in force (s).

III. Having thus seen how far parol evidence is admissible to *contradict*, *vary*, or *wholly subvert*, a written instrument, as also, on the other hand, to *establish*, *explain*, and *support* written evidence, it remains, in the third place, to consider in what cases parol extrinsic evidence is admissible to prove a fact by virtue of its * own weight and authority, notwithstanding the casual existence or use of collateral written evidence to prove or disprove the same fact. What has been already said supplies, indeed, a sufficient test; for it seems, that in general, the mere circumstance that a written instrument exists which *may* be made evidence of a particular transaction, does not exclude oral testimony either to prove or disprove the fact, unless that written instrument be by law constituted the *authentic* and *sole* medium of proving that fact (t).

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force and ef-
fect of parol
evidence.

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can that presumption be considered to be so weak as to be met and defeated by mere oral declarations? It seems to be inconsistent to consider such evidence to be more forcible than the written instrument, and yet weaker than oral evidence, and it is in effect to give to oral evidence a greater authority than the written evidence, to subject solemn and authentic written instruments to all the laxity and uncertainty of parol evidence, and to render titles to property, contrary to the policy of the law, hazardous and precarious. *Vide* 1027, note (x).

(q) See tit. *Presumption*; and Heinecc. ad Pand. Part IV. s. 124.

(r) See 2 H. B. 522.

(s) *Goodtitle v. Otway*, 2 H. B. 516.

(t) See *Grey v. Smithyes*, 4 Burr. 2273, & *infra*, 1054. [*Commissioners v. Allen*, 2 Rep. Con. Ct. 88.]

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Written In-
strument,
when conclu-
sive in its
nature.

The importance of the subject, however, renders it desirable further to consider, 1st, In what instances written instruments are of an *exclusive* nature. 2dly, with respect to what *parties* and to what *facts*.

In the first place, written evidence enjoys an exclusive operation in many instances, by virtue of peremptory legislative enactments (*u*). So it is in all cases of written contracts (*x*).

So also, in all cases where the acts of a court of justice are the subject of evidence. Courts of record speak by means of their records only; and even where the transactions of courts, which are not, technically speaking, of record, are to be proved, if such courts preserve written memorials of their proceedings, those memorials are the only authentic means of proof which the law recognizes (*y*). And it seems that, in general, where the law authorizes any person to

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make an inquiry of a judicial nature, and to register the proceedings, *the written instrument (*z*) so constructed is the only legitimate medium to prove the result.

Thus, as has been seen, parol evidence cannot be received of the declaration of a prisoner taken before a magistrate under the statutes of Phil. & Mary, where the examination has, as required by those statutes, been taken in writing (*a*).

So the official return of the sheriff to a writ of execution is usually conclusive as between the litigating parties, although not as between them and himself (*b*).

But in general, public and authorized documents, whether appointed by express authority of law, or recognized by the laws as instruments of authority, if they be but collateral memorials of the fact, possess no exclusive authority as instruments of evidence. Thus, although the entry

(*u*) *Supra*, tit. *Frauds*, Statute of.

(*x*) *Supra*, 81. 1001.

(*y*) *Vide supra*, *Insolvent*, 729, note (*b*). [*Thompson v. Bullock*, 1 Bay, 364.] In *Bliedstyn v. Sedgwick*, (Rep. Temp. Hardw. 304.) the Court refused to hear parol evidence of the condemnation of a ship in Carolina, a copy of the condemnation which had been given to the captain having been lost at sea. [See *Arnold v. Smith*, 5 Day, 150.]

(*z*) Or, in some instances, an examined copy of it. *Supra*, Vol. I. p. 151.

(*a*) *Supra*, 50. [*The State v. Grove*, Martin's Rep. 43.] But parol evidence may be given of the same declarations made by the prisoner at other times, *supra*, 52; *infra*, 1054; note (*c*). [*The State v. Wells*, 1 Cox's Rep. 424.]

(*b*) *Gyfford v. Woodgate*, 11 East, 296, Vol. I. p. 284. [See *Lewis v. Blair*, 1 N. Hamp. Rep. 68.]

of a marriage in the parish register, made according to the Marriage Act, be evidence of the marriage, it does not exclude the parol evidence of any witness who can prove the fact of marriage. So, although public printed proclamations of Government Gazettes, public books, official returns, and other (c) documents of authority, are admissible in evidence to prove particular facts, they do not exclude parol evidence. The principle applies in general, as it seems, where the document contains a mere subsequent memorial and recognition of the fact (1).

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Instrument,
when con-
clusive.

A receipt for money, it has been held, is not conclusive evidence against the person who gives it, that he has actually received the money (j).

Receipt.

* Thus, upon the failure of an annuity deed for want of * 1045

(c) Vol. I. p. 165, 6.

(j) See 1 Sid. 44. 1 Lev. 43. 1 Saund. 285. 2 Lutw. 1173. Co. Lit. by Harg. & But. 373. *Latour v. Bland*, 2 Starkie's C. 382.

(1) [Parol evidence is admissible to prove the defendant to be an innkeeper, in an action against him as such, although his license as such is on record. *Owings v. Wyant*, 1 Har. & M'Hen. 393. Or to prove the existence of a partnership, although there are written articles of partnership. *Widdifield v. Widdifield*, 2 Binney, 245. See also 1 Serg. & Rawle, 464. On an issue of infancy, parol evidence is admissible to prove the age of the party, though there be an entry in the family bible. *Buler v. Young*, 3 Bibb, 520.

In Massachusetts, parol evidence of marriages is received, although officiating clergymen and magistrates are by statute required to keep a record of all marriages solemnized before them, and to return annually, to the clerk of the town where they reside, a certificate of the names of all persons by them joined in marriage. So parol proof of the age of persons, and the time of their death, is constantly admitted, although a statute requires that births and deaths shall be recorded by town clerks; and parents, householders, &c., are liable to a penalty for neglecting to give notice of births in their families.

Where the magistrate, before whom a clerk of a militia company was alleged to have taken the oath of office, made no record of administering such oath, testimony of witnesses present when the oath was administered was admitted to prove the fact. *Bassett v. Marshall*, 9 Mass. Rep. 312. See *Colburn v. Ellis & al.*, 5 ib. 427. *Welles & al. v. Battelle & al.*, 11 ib. 477.

On an indictment for uttering, &c. a counterfeit bank note, parol evidence is admissible to prove that the person, whose name appears on the note as president, actually was president of the bank. *Smith v. Smith*, 5 Day, 175. So parol evidence is admissible to prove that the defendant is a judge, on the question of discharging him on common bail. *Gratz v. Wilson*, 1 Halsted's Rep. 419. Documents, certified by a foreign notary, tending to prove a transfer of an American vessel to a foreigner, may be contradicted by parol evidence. *U. States v. The Jason*, 1 Peters' Rep. 450.

See Post. 1054, note (1).]

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Instrument,
when con-
clusive.
Confession.

a memorial, upon an action brought by the plaintiff against the two grantors, to recover the consideration paid, one of the defendants, who was a surety only, was permitted to show, notwithstanding his having signed a receipt for the money, jointly with the other defendant, the principal, that he had never in fact received the money (*d*).

In the case of *Wilson v. Paulter*, which is very briefly reported (*e*), it is stated merely that a defendant in trover was charged with his confession taken before commissioners of bankrupt, and that the Chief Justice refused to let the defendant explain it by parol evidence. It is not stated in what way the defendant proposed to explain the document; and it would not be safe to rely much on so very loose a report.

In the common case of a confession taken before a magistrate, on a charge of felony, the practice is for the prosecutor to prove by evidence that the written document produced is a faithful account of the prisoner's statement; upon principle, therefore, it scarcely admits of doubt that the prisoner is at liberty to meet such evidence by contrary testimony, and to show that the written instrument is inaccurate. The statutes which authorize the magistrate to take the examination of prisoners do not give them an exclusive force; and their admissibility and operation as evidence seem to stand upon the same footing with any other admissions at common law (*f*), which, in such instances, are * usually inconclusive (*g*). And it seems that in general, where a document, such as a letter, not being matter of compact and agreement, is given in evidence as an admission by the adversary, the latter may adduce evidence to show that it originated in mistake, or to explain it by circumstances (*h*).

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As to what
facts.

2dly. Next, with respect to the parties, and the particular facts which it recites.—The instrument offered in evidence, whether record, deed, or simple contract, is offered

(*d*) *Stratton v. Rastall & another*, 2 T. R. 366. And see *The Attorney General v. Randall and others*, 2 Eq. C. Abr. 742, and cited 2 T. R. 369, and approved of by Buller, J.; where, although a receipt had been signed by three trustees, the Lord Chancellor decreed that the one only who had received the money should be answerable for it. But see *Rowntree v. Jacob*, 2 Taunt. 141. See tit. Receipt.

(*e*) 2 Str. 794.

(*f*) *Supra*, 51.

(*g*) *Supra*, tit. Admissions.

(*h*) *Supra*, 35, & vid. *Holsten v. Jumpson*, 4 Esp. C. 189. 1 T. R. 182.

either as between the *same* parties, or where either one or both are *different*. Even where both parties are the same, it frequently happens that the instrument will not operate as an *estoppel* unless it be specially *pleaded* (i); and if it has not been pleaded, parol evidence of the fact is admissible in contradiction of the written instrument (j).

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evidence as to
what facts,
inconclusive
inter partes.

In the next place, even where a record or deed exists, which is *conclusive* upon the *parties*, it is not always *conclusive* upon *all points*.

Thus, evidence is admissible to prove that a deed was executed, or a bill of exchange made, at a time different from the date (k), or that the party in whose name a contract for the sale of goods was made was but the agent of another (l) (1). And even in the case of records, * which are * 1047 conclusive as far as regards their substance, averments and proofs may be received to contradict them as to time and place, and many other particulars (m).

The reason is, that in the case of the record, the points of

(i) *Supra*, Vol. I. p. 205-6. 303.

(j) Parol evidence is admissible to show that land described in a deed as meadow was not meadow, for it is not the essence of the deed. *Skipwith v. Green*, 1 Str. 610.

(k) The plaintiff may declare on a bond bearing date on one day, and prove a delivery on another day (*Goddard's case*, 2 Co. 4, b), or allege a deed to have been delivered on a day different from that on which it bears date. *Hall v. Cazenove*, 4 East, 477. *Stone v. Bale*, 3 Lev. 348. [*Giles v. Meeks*, Addison's Rep. 384. *Geiss & al. v. Odenheimer*, 4 Yeates, 278. *Fox's Lessee v. Palmer & al.*, 2 Dallas, 214. S. P.]

(l) *Wilson v. Hart*, 7 Taunt. 295; *supra*, 635. So a purchaser of land, having made the purchase in the name of another, may show that he (the purchaser) paid for it, in order to raise a resulting trust. 1 Vern. 366. Where parol evidence was offered (to raise an equity) that a pension granted by the Crown absolutely was in trust for the plaintiff, which the defendant, by his answer, denied, the evidence was rejected by Lord Thurlow. *Fordyce v. Willis*, 3 Bro. C. C. 577.

(m) See Starkie's Crim. Pleadings, 2d edit. 325, and *supra*, Vol. I. p. 199. [*Brier v. Woodbury & al.*, 1 Pick. 362. *Burton v. Pond*, 5 Day, 160.]

(1) [The acts of agents do not derive their validity from professing on the face of them to have been done in the exercise of their agency; but the liability of the principal depends on the facts, 1st. That the act was done in the exercise, and 2d. Within the limits of the power delegated; and on ascertaining these facts, as connected with the execution of any written instrument, parol testimony is admissible: Hence, where a check, drawn by a person who was the cashier of a bank, appeared doubtful on the face of it, whether it was an official or private act, parol evidence was admitted to show that it was an official act. *Mechanics' Bank of Alexandria v. Bank of Columbia*, 5 Wheat. 326.]

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variance would not have been considered to be material at the trial, and therefore the evidence does not in effect contradict the record; and that in the case of deeds or other agreements it was not the intention of the contracting parties to bind themselves precisely as to such particulars, such instruments being, for the sake of convenience, frequently executed on days different from those on which they bear date, and commercial agreements being as frequently made on behalf of a principal in the name of an agent (l).

The parties to a written agreement are not, in general, precluded from proving facts consistent with the agreement, although not expressed in the agreement. Where the written agreement was, that Maxwell should purchase of Sharp 2,000*l.* stock, it was held that the plaintiff might give in evidence a parol agreement to buy 2,000*l.* stock (which belonged to Sharp and Abbot, but stood in the name of Sharp) of Sharp and Abbot, the parol being consistent with the written agreement (m).

And as between the parties to a deed, or those who claim in privity, evidence is admissible to show the purpose and intention of executing the instrument, provided it be perfectly consistent with the legal * operation of the instrument, and not inconsistent with its express terms.

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Thus, in the case of *Milbourn v. Ewart & others* (n), where a man, in contemplation of marriage, executed a bond to his intended wife (the plaintiff), conditioned for the payment of money by the heirs or executors of the obligor to the plaintiff, at the expiration of twelve calendar months from and after the death of the obligor, and to an action on the bond against the heirs at law of the deceased husband, they pleaded the marriage, &c. and the plaintiff replied the fact that the bond was made in contemplation of a marriage between the defendant and the obligor, and with intent, that in case the marriage should take place, and the plaintiff should survive her husband, the plaintiff should have the benefit of the bond, it was held that those facts might well be averred, being perfectly consistent with the bond.

It has already been seen, that as between parties to a deed, evidence of a further consideration than that expressed in the deed is admissible where the evidence does not contradict the deed (o).

Except in cases where the Statute of Frauds requires a

(l) *Supra*, 635; *infra*, 1067, 1087, 8.

(m) *Maxwell v. Sharp*, Say. 187.

(n) 5 T. R. 381.

(o) *Supra*, 1004.

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written agreement, parol evidence may be admissible, in conjunction with written, to prove the agreement. Thus, if an agreement be reduced to writing, parol evidence is admissible to show that the parties, without writing, afterwards varied the terms (*p*); for here the evidence is offered, not to vary the terms of an instrument which stands admitted as the real record of the intention of the parties, but is offered consistently with the existence of the instrument, and confessing that it does so exist, in order to avoid its * effect by proof of a new agreement, adopting the old one, * 1049 either wholly or in part, but annexing certain additional terms.

It has indeed already been seen, that previous or cotemporary declarations are not admissible to vary the terms of a written agreement; where, however, the nature of the subject-matter does not require the agreement to be in writing, although a presumption arises, in the absence of proof to the contrary, that the parties expressed in writing the *whole* of their intention in respect of the subject-matter, and intended the written terms to operate as an agreement, yet that presumption may, it seems, be rebutted by express evidence that what was so written was intended as a mere memorandum of one part or branch only of a more general agreement, and was not intended to operate absolutely and unconditionally (*q*), or it may be shown that a

(*p*) *Lord Milton v. Edworth*, 6 Bro. P. C. 587. *Cuff v. Penn*, 1 M. & S. 21. *Supra*, 1002; *infra*, 1050.

(*q*) See *Jeffery v. Walton*, 1 Starkie's C. 267. The action was in *assumpsit* for not taking proper care of a horse. A written memorandum was made upon hiring a horse "six weeks, at two guineas — *W. W.* (the hirer);" Lord Ellenborough held that evidence was admissible to show that at the time of the hiring it was expressly stipulated, that as the horse was used to *shy*, the hirer, if he took him, should be liable to all accidents.

In many instances, the terms reduced to writing may constitute but a small part of the real contract. Suppose *A.* to let a house by parol to *B.* for two years, and that at the time of the parol agreement a stipulation as to the furniture is made, for convenience of calculation, in writing, and that at the foot of the account is written "*B.* to take the furniture at the above valuation," it would be difficult to contend that *B.* would be bound to buy the furniture, although *A.* refused to let him occupy the house, and that *B.* would be concluded by the written part of the engagement from showing the real condition annexed to it.

An order for goods, describing their number and kind, is evidence for the plaintiff in an action against the defendant for not delivering the goods, although no time or price was mentioned; and the defendant's acceptance of the order, and the price agreed upon, may be proved by parol. *Ingram v. Lea*, 2 Camp. 521. Where the terms of adjustment with an underwriter were indors-

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parol contract was made independently, wholly collateral to and distinct from a written one made at the same time. In such cases, the parol evidence is used not to *vary the terms* of the written instrument, but to show either that it is *inoperative* as * an entire and independent agreement, or that it is collateral and irrelevant.

Where a statute requires the agreement to be in writing the case admits of a very different consideration; there the oral and written terms could not, it should seem, be incorporated; and it might be very questionable, under the circumstances, whether the previously written agreement would be discharged and revoked by a subsequent oral agreement (r) (1). In cases however which are under the dominion of the statute of Frauds, parol evidence is admissible to show a dispensation with the performance of part of the original contract, such as an agreed substitution of other days than those stated in the contract for the delivery of goods sold (s). It is otherwise where the terms of the

ed on the policy, and the money was paid, parol evidence was admitted of a previous agreement, that if the other underwriters should eventually pay a less sum, the surplus should be returned. *Russell v. Dunskey*, 6 Moore, 233.

(r) An agreement to wave a contract for the purchase of lands is as much an agreement concerning lands as the original contract is and must therefore, as it seems, be in writing. See Lord Hardwicke's observations in *Buckhouse v. Crosby*, Eq. C. Abr. 33, and in *Bell v. Howard*, 9 Mod. 302. In *Parteriche v. Poulet* (2 Atk. 384), Lord Hardwicke is reported to have said, that to add any thing to an agreement in writing, by admitting parol evidence which would affect land, is not only contrary to the statute of Frauds, but to the rule of common law before the statute was in being; yet, as mere parol agreements concerning land were operative before the statute, there seems to have been no reason why a written contract should not be varied by a subsequent oral agreement when it related to lands, as well as in any other case. See *Clinan v. Cooke*, 1 Sch. & Lef. 35.

(s) *Cuff v. Penn*, 1 M. & S. 21. See also the case of *Warren v. Stagg*, cited in *Littler v. Holland*, 3 T. R. 591; where Buller, J. held that an agreement to extend the time was not a waiver but a continuance of the original agreement. See also *Thrush v. Rake*, 1 Esp. C. 53, Cor. Lord Kenyon; where, in a written agreement,

(1) [Where land was sold and conveyed, and the parties afterwards agreeing to rescind the contract, the conveyances were given up, but, by accident, the notes for the purchase money were not given up; it was held, in an action on the notes, that parol evidence of the rescinding of the contract could not be given at law; the land, having been vested by deed, could not be divested otherwise than by deed. *Sally v. Sandys*, 2 Rep. Con. Ct. 445. See *Barrett v. Thorndike*, 1 Greenleaf, 72. *Marshall v. Fisk*, 6 Mass. Rep. 24. *Eames v. Savage*, 14 ib. 425.]

written contract would be varied by the subsequent agreement (t).

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* Next, where one of the contending parties was *not a party* to the record or other instrument.—It has been seen, that in some instances, where the proceeding is, as it is technically termed, *in rem*, the judgment or decree is final and conclusive upon all (u). Where, however, the record is admissible, but not conclusive evidence, even parol evidence seems to be admissible to prove the fact in contradiction of the record.

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Thus, upon an indictment against an accessory to a felony, although the record of the conviction of the principal be admissible evidence to prove the fact, yet, as it is not conclusive, the accessory is entitled to adduce any legal evidence in contradiction of the fact stated on the record (x).

Although there are many instances in which a deed or agreement between others is evidence for or against a stranger, or where such a deed or other agreement would be evidence in favour of a mere stranger, as to some extrinsic fact stated in the instrument *against a party*, yet it seems to be a general rule, that in all these cases parol evidence of the fact would still be admissible; in other words, the instrument could never conclude the party by estoppel or otherwise.

Thus, in the case of *The King v. Scammonden* (y), * already cited, the inhabitants of a parish were permitted to show that 30*l.* was in fact paid as the consideration upon

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an appraisement on a given day was specified as a condition precedent, oral evidence of an enlargement by consent was admitted. Cor. Lord Kenyon. But see *Snowball v. Vicaris*, Bunb. 175.

(t) See Lord Ellenborough's observations in *Cuff v. Penn*, 1 M. & S. 26; where he says, "If this agreement had been varied by parol, I should have thought, on the authority of *Meres v. Ansell*, (3 Wils. 275), that there had been strong ground for the objection." But note, that *Meres v. Ansell* was decided wholly, as far as the report intimates, upon the general principle of the inadmissibility of a *contemporary* parol agreement to vary the terms of a written one. In *Cuff v. Penn* (and the same observation is applicable to *Meres v. Ansell*), and all other cases within the statute of Frauds, the statute itself precludes any alteration of a written contract by a subsequent parol agreement.

(u) *Supra*, Vol. I. p. 288; & *vid. infra*, tit. *Settlement*.

(x) *Supra*, tit. *Accessory*, 14.

(y) 3 T. R. 474. See other cases where evidence has been admitted of a consideration different from that expressed in the deed. *Filmer v. Gott*, 7 Bro. P. C. 70. *Clarkson v. Hanway*, 2 P. Wms. 203. 1 Ves. 128; & *supra*, 1004. 1016.

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the sale of an estate, although the deed of conveyance between the parties specified 23*l.* as the consideration. Here the question was as to the value actually given for the estate; and although the agreement was *prima facie* evidence as to the fact, and although the parties themselves might have been bound by their own representation of the transaction, it was not binding upon strangers to the exclusion of the real fact.

In the case of *The King v. Laindon* (z), the question as to a settlement, was, whether the parties intended to contract as master and servant, or as master and apprentice; the written agreement was as follows: "I, J. M. do hereby agree with J. C. to serve me three years, to learn the business of a carpenter, the first year to have 1*s.* 2*d.* per day, the second year to have 1*s.* 6*d.* per day, &c." In addition to this, J. C. was admitted to prove, at the trial, that at the time of signing the agreement he agreed to give J. M. the sum of three guineas, as a premium to teach him the trade, and that he was not to be employed in any other work. The court of King's Bench held that the evidence was admissible, being offered not to contradict a written agreement, but to ascertain an independent fact (a). It is however to be observed, upon this case, that the question might have been very different indeed had it arisen as between the contracting parties; as if, for instance, a dispute had arisen between them as to the nature of the service which the master had a right to exact by virtue of the agreement. If in *that case the servant had insisted on the co-existing parol agreement, to limit his service to carpenter's work, the objection would have operated strongly that this would have been to superadd terms by parol to those contained in the written instrument, or to explain the intention of the parties by parol evidence (b). But the question was between strangers to the contract; the point in issue was, the real intention of the parties when they committed certain terms to writing, the terms so written were admissible evidence, as tending to prove the fact on the natural presumption, in the absence of all suspicion of fraud, that the parties would disclose their real intention; but this was not the *only* medium of proof, neither was it an *exclusive* one, for the private statement of the parties could not, on any principle, bind and estop strangers.

(z) 8 T. R. 379. See also *R. v. Shinfield*, 14 East, 544.

(a) Per Lord Kenyon, C. J. and Lawrence, J.

(b) *Supra*, 1003, & seq. [See *Strong v. Glasgow*, 1 Car. Law Rep. 279. *Hawkins v. Hawkins*, *ibid.* 496.]

Where the action was brought against an heir and devisee, on a bond, and issue was taken on the fact, whether the defendant had sold the estate for more than 168*l.* a lease and release were produced in evidence, from which it appeared that the defendant had sold the estate for 210*l.*, but it was held that he was at liberty to prove that part of the estate so sold did not belong to the testator, but had been purchased by the defendant for the sum of 42*l.* in order to be sold to the vendee (c). Here the evidence was consistent with the terms of the deed; but even if it had not been so, it seems that it would still have been admissible as between those parties, for although, as between the defendant and the vendee, the defendant might have been estopped by his deed from making any averment against it, yet as between the plaintiff and defendant there was no mutuality, and consequently no estoppel, and therefore the defendant was not concluded upon * issue joined as to the amount for which the estate sold, from showing the real fact. It was held in the same case, that although the deed stated that the consideration was paid to the vendor, evidence was admissible to show that it was paid to a third person, with his privity.

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A party to a deed may in an action between others contradict the deed by his testimony; thus, one who has jointly with another executed an assignment of a ship, as of their joint property, is competent to prove that he had no interest in it (d).

With the exceptions already adverted to, the general inference, as above stated, seems to be, that oral evidence may be used indifferently as original and independent evidence of a fact, either concurrently with or in opposition to written testimony; and that written evidence, however superior it may be, and frequently is in effect to mere oral evidence, does not in any case, of its own authority, unaided by an express rule of law, exclude such evidence (1).

General rule as to the independent operation of parol evidence.

(c) *Green v. Weston*, Say. 209.

(d) 1 T. R. 301; & *supra*, 17, 18.

(1) [Parol evidence is admissible to enlarge the time of performance of a written simple contract. *Keating v. Price*, 1 Johns. Cas. 22. Or to enlarge the time for performing a condition; or to show a waiver of the performance of it. *Fleming v. Gilbert*, 3 Johns. 528. Or to prove an accord executed in discharge of a written agreement previously made. *Hall v. Stewart*, 5 Day, 428. Or to show that at the time of entering into articles for the sale of land, it was agreed by the parties, that the instalments should be paid in whatever money was current at the time they fell due, the articles not specifying the kind of money to be paid. *McKen v. Owen*, 1

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In an action for bribery at an election, it was held that parol evidence was admissible to prove the delivery of the precept to the returning officer, although it appeared that the returning officer had indorsed upon the precept, with a view to prove it, the time of his having so received it, and that the indorsement had been attested by two witnesses (e).

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To confirm or contradict unauthenticated written evidence.

* So an instrument in itself defective and inoperative may be confirmed and supplied by oral testimony, and operate in conjunction with it. Thus, where in the bishop's register a blank was left for the name of the patron, it was held that this might be supplied by oral testimony (f), for as the presentation itself might have been by parol, it might have been proved by the aid of the suppletory

(e) *Grey v. Smithyes*, 4 Burr. 2273. It appeared in the case of *Reason v. Tranter*, 1 Stra. 499, that the dying declaration of Mr. Lutterel, the deceased, had been taken down in writing, by a witness, at the instance of two justices of the peace who were present; the witness had afterwards copied the writing thus made, and produced it at the trial; but the original was not produced. The court held that the copy was not evidence. Upon this it may be observed, that although the copy was not evidence, the original being still in existence, and being better evidence than the copy, yet it seems, that in such a case, the mere fact that the witness reduced the declarations to writing at the time would not exclude parol evidence of those declarations, the instrument not being an authentic one, authorized by the statute of Phil. & Mary. (See *Sayer's case*, 12 Vin. Ab. 23, pl. 7.) In the same case other declarations of the deceased which had not been taken down in writing, made at other times, were received in evidence. See 2 Starkie's C. 206.

The fact that a receipt has been given does not exclude parol evidence of payment by a witness who saw the money paid. *Ram- bert v. Cohen*, 4 Esp. C. 213. Cor Ld. Ellenborough.

(f) *Bishop of Meath v. Lord Belfield*, 1 Wils. 215.

Yeates, 135. 2 Dallas, 173. S. C. But where certain money had been made a legal tender by statute, parol evidence was held inadmissible to show what kind of money was meant under the words "current lawful money." *Lee v. Biddis*, 1 Dallas, 176. *Bond v. Haas's Ex'rs*. 2 ib. 133.

Parol evidence is admissible, in an action by the indorsee against the indorser of a note, indorsed in blank, to show that at the time of the indorsement, the indorsee received the note under an agreement that he should not have recourse to the indorser. *Hill v. Ely*, 5 Serg. & Rawle, 363. S. P. *Field v. Nickerson*, 13 Mass. Rep. 138. *Cummings v. Fisher*, Anthon's N. P. 4. So in an action, by the assignee against the assignor of a sealed note, to recover back the consideration paid on the assignment, parol evidence was held admissible, on the part of the defendant, to prove that at the time of assigning the note, the plaintiff agreed to put it immediately in suit, and to take it at his own risk. *Mehelm v. Barnet*, 1 Cox's Rep. 86. See also *Storer v. Logan*, 9 Mass. Rep. 55.]

parol evidence, consequently there was no unwarranted substitution of oral for written evidence.

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PARTICULARS, BILL OF.

THE object of a bill of particulars is to give the defendant more specific and precise information as to the nature and extent of the demand made upon him by the plaintiff, than is announced by the declaration (g), in a mode unencumbered by the technical *formalities of * 1056 pleading. Hence, as will appear from the decisions on this head, referred to below, particulars are in general sufficient, provided they be not so materially erroneous (h) as

Object of.

When
sufficient.

(g) Wherever the form of pleading is so general as not necessarily to enable the defendant to prepare fully for his defence, as where a general form is given by a statute, such as 9 Ann. c. 14, or 25 Geo. II. c. 36, it seems that the plaintiff would be required to furnish a bill of particulars. See Tidd's Practice, 7th edit. [*Mercer v. Sayre*, 3 Johns. 248.] So where the action is on a bond conditioned to indemnify or to perform covenants. So in ejectment on a forfeiture of a lease (*Doe d. Birch v. Phillips*, 6 T. R. 597); or if the plaintiff declare generally in ejectment, and without sufficiently specifying the lands sought to be recovered (7 East, 332); so the plaintiff may call on the defendant in ejectment to specify for what he defends, where it is not ascertained in the consent-rule. But where the particulars are specified in the declaration, as in actions of special assumpsit, covenant, debt, or articles of agreement, or in actions for *torts* specified in the declaration, an order for particulars does not appear to be requisite. Tidd's Practice, 613, 7th edit.

In an action for *assumpsit* against the vendor for breach of contract in the sale of a house, with counts to recover the deposit, the plaintiff having in his first count alleged that the defendant, who was bound to make a good title, had delivered an insufficient abstract, the Court obliged the plaintiff to give a particular of all the objections to the abstract arising upon matters of fact (*Collett v. Thompson*, 3 B. & P. 246). In ejectment brought on a forfeiture of a lease, the Court will compel the plaintiff to give a particular of the breaches on which he means to rely. *Doe d. Birch v. Phillips*, 6 T. R. 597.

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(h) The particular should contain an account of the items of demand, and state when, and in what manner, they arose; and it is sufficient to refer to a particular already delivered, without re-stating it (Peake's C. 172. Tidd's Pract. 614, 7th edit.) If the bill specify the transaction upon which the claim arises, it need not specify the technical description of the right resulting to the plaintiff from that transaction (*Brown v. Hodgson*, 4 Taunt. 189). It will be a contempt of court to deliver a particular as general as the declaration (*Brown v. Watts*, 1 Taunt. 353); but it is sufficient if it convey the requisite information, although it be inartificially drawn up (1 Camp. 69). It has been said, that where there has been an account current, and the party means to give credit, the particular ought to state those items meant to be allowed (per *Ld. Kenyon*, *Mitchell v. Wright*, 1 Esp. C. 280). And where an attorney, by his bill of par-

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Objection to
omission in,
how taken.

Defects in.

probably to have led the * defendant into error ; but if on the other hand the particulars vary so materially from the evidence as to render it probable that the defendant has not been apprized of the real claim intended to be made by the plaintiff, the latter will be precluded from going into evidence of that part of his demand.

In order to preclude the plaintiff from giving evidence of any item not included in the bill of particulars, the order for delivering the bill must be produced, and the delivery of the bill be proved (i). If a first bill of particulars has been delivered, under a Judge's order, and the plaintiff deliver a second without any order, he can give no evidence of any item which is not contained in the first particulars (k), for the latter will not supersede the former, neither will it confine the plaintiff in his evidence.

Where the particulars stated merely that the demand was on a promissory note, which for want of a stamp could not be given in evidence, it was held that the plaintiff could not go into evidence of the consideration for which the note was given (l).

If the particulars state the demand to be for goods sold and delivered to the defendant, no evidence can be given of goods sold and delivered by the defendant as agent for the plaintiff (m).

A mistake in the date, as to the demand upon a particular item, is not material where the date cannot mislead (n), as where the particular states the work for * which the action is brought to have been done in one month, when

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particulars, claimed 200*l.*, although, on allowing for payments, the balance was but 10*l.*, the plaintiff was compelled to take the balance without costs (2 Camp. 410). But the practice does not conform with these cases (Tidd's Pract. 614, (e), 7th edit.) And in a late case, Holroyd, J. held, upon an application at chambers, that it was sufficient to state the items on the debtor side only (*Cooke v. Cooke*, MS.). And see *Miller v. Johnson*, 2 Esp. C. 602, where Eyre, C. J. observed that it was never the intention, in compelling a party to give a particular under a Judge's order, to make him furnish evidence against himself, and that such an use could not be made of it. [*Ryckman v. Haight*, 15 Johns. 222. acc.]

(i) *Peake's C.* 172. 2 B. & P. 243. 1 Esp. C. 195. 3 Esp. C. 168.

(k) *Brown v. Watts*, 1 Taunt. 353. *Short v. Edwards*, 1 Esp. C. 374.

(l) *Wade v. Beasley*, 4 Esp. C. 7. The action was by the payee against the executor of the maker. But see *Brown v. Hodgson*, 4 Taunt. 189, and *supra*, 1056, note (h).

(m) *Holland v. Hopkins*, 2 B. & P. 243.

(n) *Milwood v. Walter*, 2 Taunt. 224.

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in fact it was done in another month, and no work was done in the month so specified (*p*).

Defect in.

The plaintiff is not precluded from recovering a demand made in the particulars by his having omitted to include the item in a bill delivered before the action was brought (*q*), but the previous omission may, under the circumstances, afford a presumption against the claim.

A reference to an account delivered before the commencement of the action is a virtual compliance with the order for the delivery of a bill of particulars and the plaintiff is bound by the account (*r*).

Where a party cannot have been misled by a mistake made in the particulars, the error is not in general material.

Defect when immaterial.

Where the particulars specified a payment made by the plaintiff, on account of the defendant, to *A.*, and it turned out that it had been made to *B.*, it was held to be sufficient, unless the defendant would make affidavit that he had been misled by the particulars (*s*). So where the particulars, in an action of debt for rent, stated the premises to be at *A.* instead of *B.*, it was held to be no ground of nonsuit unless the defendant could prove that he held other premises at *A.* of the plaintiff (*t*).

Where the plaintiff's particulars were for horses sold, and upon an account stated, and the defendant paid money into court sufficient to cover the latter demand, * and the plaintiff failed on the former demand, it was held that he could not apply the money paid to the counts for horses sold, on which he had given no evidence; and he was nonsuited (*u*). * 1059

The plaintiff may recover interest, although the particular merely states a demand upon a promissory note (*x*).

Where in *assumpsit* the defendant pleaded non-joinder in abatement, and the particular contained items as due from the defendant and his partner, who was not sued, it was held that the particulars supported the plea, although part of the demand was due from the defendant solely (*y*).

The giving credit to the opposite party, where there has

(*p*) 2 Taunt. 224.

(*q*) *Short v. Edwards*, 1 Esp. C. 374.

(*r*) *Hatchet v. Marshal*, Peake, 172. *Etches v. Fellowes*, Wightw. 78.

(*s*) *Day v. Bower*, 1 Camp. 69, n.

(*t*) *Davies v. Edwards*, 3 M. & S. 380.

(*u*) *Holland v. Hopkins*, 3 Esp. C. 168. 2 B. & P. 243.

(*x*) *Blake v. Lawrence*, 4 Esp. C. 147. So where the plaintiff confined his particulars to one count of his declaration:

(*y*) *Colson v. Selby*, 1 Esp. C. 452. And the Court of K. B. afterwards refused to set aside the nonsuit.

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by way of
admission.

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Particular of
demand.

Objection that
a bill has not
been delivered.

been an account current between them, is not an admission that the sum is due (z).

The particulars of set-off are considered as incorporated with the notice of set-off, which is in the nature of a plea, and therefore a plaintiff cannot make use of a notice of set-off as evidence of the debt under the plea of *non assumpsit*, nor can he use a particular of set-off for that purpose, for it is incorporated with the notice (a).

* Although the plaintiff be restricted in his own evidence by his particular, he may avail himself of any evidence adduced by the defendant to increase his demand (b).

The plaintiff brought an action against his partner, and confined himself by his particular to a balance due on a separate account; the defendant produced a subsequent account, stated by the plaintiff, in which the latter made himself a debtor on the separate account, but on the same paper stated also the general account by which he made himself creditor to a greater amount than that claimed on the separate account; the Court said that the defendant had made a better case for the plaintiff than he was at liberty to have made for himself, and that the plaintiff was entitled to a verdict for the balance on the general account (b). Here the defendant himself proved the plaintiff's claim to the larger sum, by giving in evidence the balance due on the general account, since the whole of the plaintiff's statement was in evidence.

If the particulars of the defendant's set-off be not delivered within the time limited by the order, he will be precluded from giving evidence in support of his set-off, but the plaintiff cannot make an objection to such particulars at the trial, which might, if taken earlier, have been rectified by the defendant, or by the Court (c).

The objection on the score of variance between the proof and the particulars must be taken on the trial, after production and proof of the particulars (d) (1).

(z) *Miller v. Johnson*, 2 Esp. C. 602. Note, there the question was upon the particulars of set-off delivered by the defendants, and it was held that the admission of an item in the plaintiff's account did not render proof by the plaintiff unnecessary. See also 5 Taunt. 228. 1 Marsh. 33. S. C.

(a) *Harrington v. Macmorris*, 5 Taunt. 228. 1 Marsh. 33. *Supra*, Vol. I. p. 295.

(b) *Hurst v. Watkis*, 1 Camp. 68.

(c) *Holt's C.* 552.

(d) Where the plaintiff recovered a greater sum than he claimed

(1) [If the plaintiff neglects to deliver the particulars of his demand

* PARTIES (f).

PART
IV.Grounds of in-
competency.

THE rule which excludes a party from giving evidence in his own cause is not founded merely on the consideration of his interest; if it did, it would follow that a party² might always be called by the adversary to give evidence against his own interest; the rule is partly, at least, founded on a principle of *policy* for the prevention of perjury (g) (1).

by his particulars, and upon discussion, the Court of C. B. approved of the principle on which he recovered, and judgment was entered accordingly; no objection having been made on the score of excess, either at the trial or upon the argument, the court refused to reduce the judgment to the sum claimed by the particulars. *Bell v. Puller*, 2 Taunt. 285. 12 East, 496, n.

(f) As to the joinder of parties in an indictment, see Stark. Crim. Plead. 2d edit. 33; & *supra*, tit. *Accessories*.

(g) And yet either party may be put to his oath by a bill of discovery in equity, where he is quite as likely to commit perjury as if he were to be examined in a court of common law.

Where a court of equity directs a party to be examined as a witness, the objection is merely reserved *qua* competency as a party. *Rogers v. Whittingham*, 1 Swanst. 39.

mand pursuant to an order, the defendant is entitled to move for judgment as in case of *non pros*. *Henrot v. Durand*, 14 Johns. 329.

An order for a bill of particulars should be that a bill be furnished by a certain day, or that the plaintiff show cause why he has not furnished it. *Brewster v. Sackett*, 1 Cowen, 571. An order, staying proceedings absolutely until a bill of particulars be furnished, is irregular: But such order stays proceedings until it is vacated. *Roosevelt v. Gardinier*, 2 Cowen, 463.]

(1) [In *Willing & al. v. Consequa*, 1 Peters' Rep. 307, it is said, that the foundation of the rule, that a party to a suit cannot be a witness, is the interest which the party has in the event of the suit, both as to costs and the subject in dispute; and when that interest is removed, the objection ceases to exist.

In Pennsylvania, the practice is established for a party to the suit to prove the service of notice to produce papers, and to prove notice of taking depositions. *Jordan v. Cooper & al.* 3 Serg. & Rawle, 575. 584. *Kidd v. Riddle*, 2 Yeates, 444. So in summary inquiries, such as questions of bail, the evidence of parties, though interested in the event of the suit, has always been received. *Bank of Pennsylvania v. Hadfeg & al.* 3 Yeates, 560. So, to prove that a material witness is unable to attend, in order to entitle his deposition to be read. *Morris v. Flora*, cited 2 Dallas, 117. 1 Yeates, 16. (*Aliter*, in North Carolina. *Willis v. Brown*, Martin's Rep. 32. *Anon. v. Brown*, 1 Hayw. 227.) So, to prove the death of a subscribing witness to a deed, in order to let in evidence of his hand-writing. *Douglas's Lessee v. Sanderson*, 2 Dallas, 116. 1 Yeates, 15. *Levan's Lessee v. Hart*, cited 1 Yeates, 16.

PART
IV.

In a recent case, a plaintiff was by consent of the defendant allowed to be examined upon oath as a witness in the cause, although he came to defeat the claim of a co-plaintiff (h).

* 1062 It has been seen, that in general a voluntary admission made by a party to the cause is admissible evidence against him (i). This is true where the party making the admission is affected by it, in * his own private and natural capacity, but in other cases the rule is frequently inapplicable.

Where a corporation has been a party, a corporator not disqualified on the score of interest seems at all times to have been considered to be competent (k). And a declaration or admission by a corporator is not admissible in

(h) *Norden v. Williamson*, 1 Taunt. 378; and *Fenn d. Pewtris v. Granger*, 3 Camp. 177. If, however, the general rule of exclusion be founded partly on the ground of policy, it seems to be clear in principle that the rule ought not to be infringed, even although a party be desirous of examining his adversary. *Vide supra*, 706. The above case of *Norden v. Williamson* was so peculiarly circumstanced that there could be no danger of perjury.

(i) *Supra*, tit. *Admissions*, 39, & *seq.*

(k) *Supra*, 426. The men of one county, city, hundred, town, corporation, or parish, are evidence in relation to the rights, privileges, immunities, and affairs of such town, city, &c. if they are not concerned in private interests in relation thereunto, nor advantaged by such rights and privileges as they assert by their attestation. Gil. L. Ev. 128, 2d ed. 1 Vent. 351.

Whether in an action against an innkeeper, for money lost in his house, the plaintiff is a competent witness to prove the contents of a bag delivered to be kept for him? *Quare. Snider v. Geiss*, 1 Yeates, 34. Where the master of a vessel broke open a trunk, which he had received on board in London to be brought to this country, and embezzled the contents—the owner of the goods was admitted by the Supreme Court of Maine, in an action of trover against the master, to testify to the particular contents of the trunk—he having otherwise proved the delivery thereof and its violation, and there being no other attainable evidence of its contents. *Herman v. Drinkwater*, 1 Greenleaf, 27.

In South Carolina, a party interested in a cause is not a competent witness to prove the loss of a paper material to the issue. *Sims v. Sims*, 2 Rep. Con. Ct. 225. As to other States, see Vol. I. p. 350, note (1).

In England, the shop-book of a tradesman is not evidence of a debt without the oath of the clerk who made the entry: But in most of the States of the Union, the book proved by the suppletory oath of the party is admitted. In different States, this rule has different modifications, and is applied to very different kinds of charges which are entered in parties' books of account.

See Post. 1084. note (1.)

evidence against the corporation (*l*). But it has been held that the declaration of a rated parishioner is admissible, although it be exceedingly weak evidence in a case of settlement (*m*).

PART
IV.

The inhabitants of contending parishes in settlement cases are considered *sub modo* as parties, and on this ground it has been held that an inhabitant of the adverse parish is not compellable to give evidence (*n*). Still inhabitants, if not rated, were always considered to be competent (*p*). And upon indictments against the inhabitants of counties for the non-repair of bridges, and of parishes for non-repair of highways, the inhabitants, although parties, seem to have been considered as competent witnesses, except so far as they were rendered incompetent by their interest (*p*). The statute, making inhabitants of hundreds (*q*) competent, notwithstanding their interest, would have been nugatory if the objection might still have been taken that they were parties.

Who are parties.
Inhabitants of parishes, hundreds, &c.

* It has already been seen that a party to a transaction is, in general, competent, unless he be either a party to the record, or be disqualified by his interest (*a*). It still remains to be considered how far the being a party to the record will in itself operate as a disqualification. In the first place, whenever there are several defendants in *tort*, and after the whole of the evidence has been gone through on the part of the defendants as well as of the plaintiffs, if there be no evidence against any one, he may be acquitted, and examined as a witness for the rest (*r*). But a plaintiff can in no case examine a co-defendant, although nothing be proved against him (*s*) on the trial.

* 1063
Party to the record.

(*l*) *Mayor of London v. Long*, 1 Camp. 22.

(*m*) *Supra*, 41. 779. But see the observations there as to the stat. 54 Geo. III. c. 170.

(*n*) *Supra*, 779. But now *qu.* as to the operation of the stat. 54 Geo. III. c. 170, s. 9; *vide supra*, 778, 9.

(*o*) *Supra*, 777.

(*p*) *Supra*, 318. 672. 776. I am not aware of any instance where exemption from examination has been claimed in such a case by an inhabitant, on the ground that he was a party.

(*q*) *Supra*, 776. And see the stat. 8 Geo. II. c. 16. s. 15.

(*a*) *Supra*, 764, 5.

(*r*) *Supra*, 766, 7. *Qu.* whether, when an action is brought against a constable acting under a warrant, without joining the justice, the constable, on proof of the warrant, is not entitled immediately to his acquittal under the stat. 24 Geo. II. c. 44, s. 6. *Vide supra*, 811.

(*s*) *Supra*, 766. B. N. P. 285. 2 Camp. 333, *n*. The general

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IV.Party to the
record.

* 1064

A defendant upon the record, who is no party to the issue tried, may usually be examined as a witness, if he be not disqualified by interest. Thus, a co-defendant, in an action of *tort*, who has suffered judgment to go by default, is competent to prove that a co-defendant is not chargeable (*t*). But he cannot be called to prove a co-defendant guilty, for his interest intervenes (*u*). So a defendant in ejectment who has let judgment go by default is a competent witness for either a defendant (*z*) or plaintiff (*a*).

A co-defendant in *assumpsit*, who pleads his bankruptcy, is not a competent witness for a co-defendant who has pleaded *non assumpsit* (*b*). But where, in such a case the plaintiff had entered a *nolle prosequi* as to the bankrupt, the latter was admitted as a witness for the other defendants (*c*).

Variance.

The effect of a variance as to parties between the record and the evidence is considered under the respective titles

rule is, that a party to the record cannot be examined, per *Le Blanc*, J. *ibid*.

(*t*) *Wara v. Haydon & Ventom*, 2 Esp. C. 552, Cor. Lord Kenyon, 2 Camp. 334, n. Cor. Wood, B. Lancaster, 1809.

(*u*) *Supra*, 767. *Chapman v. Graves*, 2 Camp. 333, n. Cor. Le Blanc, J. Lancaster, 1810. And see *Barnard v. Dawson*, 2 Camp. 333, n. Cor. Lord Kenyon. *Supra*, 764.

It seems to be a general rule, that a plaintiff can in no case examine a co-defendant on the record, a rule founded, as it seems, on the ground of policy in preventing perjury and a consideration of the hardship of calling on a party to charge himself. And this rule seems to be strictly observed as to plaintiffs, for the joining so many defendants is their own act, although in many instances, it may be matter of necessity. The case of a defendant in ejectment who has let judgment go by default (*Doe d. Harrop v. Green*, 4 Esp. C. 198) is scarcely to be regarded as an exception. For there the proceeding is merely fictitious, and the name of the defendant does not appear upon the record. In the cases of *Mant v. Mainwaring*, 8 Taunt. 139. S. C. 2 Moore, 9; and *Brown v. Brown*, 4 Taunt. 752, it was held that a co-defendant in *assumpsit*, who had let judgment go by default, was not a competent witness for the plaintiff, for by means of his own testimony he would obtain contribution from the defendant who had pleaded. *Vide supra*, note (*s*).

(*z*) *Supra*, 767.

(*a*) *Doe d. Harrop v. Green*, 4 Esp. C. 198.

(*b*) *Raven v. Dunning & another*, 3 Esp. C. 25. See *Emmett v. Bradley*, 1 Moore, 332. Peake's Ev. App. lxxxvii. And the court would not in such a case permit a verdict to be recorded in favour of the bankrupt, for the purpose of enabling him to give evidence. *Currie v. Child & others*, 3 Camp. 283.

(*c*) *M'Iver v. Humble*, 16 East, 171.

of *Assumpsit* (d), *Carriers* (e), *Case* (f), *Deed* (g), *Ejectment* (h), *Husband and Wife* (i), *Trespass*, *Trover*, *Variance*.

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IV.

In *assumpsit* the joinder of too many, either plaintiffs or defendants, or the non-joinder of plaintiffs, is a ground of nonsuit (k), but the non-joinder of other defendants must be pleaded in abatement (l). In actions of *tort*, on the other hand, although the joinder of too many plaintiffs be a ground of nonsuit (m), the * non-joinder of plaintiffs must * 1065 be pleaded in abatement (n); the joinder of too many defendants is not a ground of nonsuit, since some may be convicted and the rest acquitted (o); the same rule applies in penal actions (p); and the non-joinder of others as defendants in *personal* actions of *tort* (q) cannot be taken advantage of, even by plea in abatement. Where, however, the action is founded *immediately* upon a contract, and for a damage resulting from mere breach of contract, although in form it be an action of *tort*, the joinder of defendants, who did not contract, would, it seems, be a ground of nonsuit under the general issue (r):

(d) *Supra*, 83.

(e) *Supra*, 333.

(f) *Supra*, 354.

(g) *Supra*, 475.

(h) *Supra*, 538.

(i) *Supra*, 685.

(k) *Supra*, 83—102. Joint-tenants must also join in actions *ex contractu* (Co. Litt. 180, b. Bac. Abr. tit. *Joint-tenants*, K. 1 B. & P. 73); and so must parceners in all actions relating to their estate (R. T. Hardw. 396, 9). Tenants in common may either join or sever in actions on contracts relating to their estate, although they must sever in *avowry* for rent. Bac. Ab. tit. *Joint-tenants*, and *Tenants in Common*, K. 1 Lev. 109. T. Ray. 80. [Yelv. 162, n.]

(l) *Ibid*.

(m) *Supra*, 355.

(n) *Supra*, 356. Joint-tenants and parceners must join in *personal* as well as *real* actions for injuries affecting their *real* property, or the non-joinder may be pleaded in abatement (Bac. Abr. tit. *Joint-tenants*, K. 2 Vin. Ab. 59. Vin. Ab. tit. *Parceners*). Tenants in common *must sever* in *real* actions, except *quare impedit*; but they *may join* in *personal* actions for a joint damage to the estate (Bac. Ab. *Joint-tenants*, K. 5 T. R. 247. Cro. Jac. 231. 2 Bl. Rep. 1077. Yelv. 161), or each may sue separately (5 T. R. 248. 2 Bl. Rep. 1077). The non-joinder of a part-owner of a chattel must be pleaded in abatement, although the omission appear on the declaration in *trover*. *Addison v. Overend*, 6 T. R. 766.

(o) *Supra*, 333. 356.

(p) *Hardyman v. Whitaker & al.* 2 East, 573, n. and see *Barnard v. Gostling & al.* 2 East, 569.

(q) 1 Will. Saund. 291, a.

(r) *Weall v. King*, 12 East, 452. [and Mr. Day's note.] The plaintiff declared for a deceit alleged to have been practised by

* and in such case one of two joint contractors cannot maintain a separate action (r).

PARTNERS.

WHERE two or more unite in partnership, for carrying on a particular trade, or other purpose, they become in point of law so identified with each other, that the acts and admissions of any one, with reference to the common object, are the acts and declarations of all, and are binding upon all. The very constitution of this relationship furnishes a presumption that each individual partner is an authorized agent for the rest, but this presumption has no operation where a party who would rely upon it has received express notice to the contrary, or where the transaction between himself and the individual partner is a fraud upon the rest.

The rules of evidence on this subject, result from these general principles of law regarding partnerships, subject to this further consideration, that the acts, conduct, and representations of parties, may be conclusive evidence of their partnership, in favour of strangers who are not cognizant of their private arrangements, but who must be guided by external indications, although, as between themselves, they are not partners. The subject will be considered as it relates to—

1. Actions by several Partners, 1067.
 - - - by one of several, 1069.
- * 1067 * 2. Actions against several, 1070.
 - - - proofs in defence, 1075.
 - - - evidence of Dissolution, 1077.
 - - - - - of Notice, 1079.
 - - - against one of several, 1081.

means of a warranty made by two defendants upon a joint sale to him, by both, of sheep, their joint property, and it was held that the plaintiff could not recover upon proof of a contract of sale and warranty by one only as of his separate property. See also *Mar v. Roberts*, 2 N. R. 454; where, in an action on the case, upon the delivery of goods to several joint ship-owners, to be carried to A. for freight, and alleging a deviation, it was held, that if the plaintiff failed to prove them all to be owners, he could not recover against the rest. It is otherwise where *negligence* is the gist of the action, although a contract exist relating to the business in which the negligence occurred. See *Govett v. Radnidge*, 3 East, 62. *Supra*, 333. 356.

(r) *Hill v. Tucker*, 1 Taunt. 7. Bail, jointly, employed an attorney to surrender the principal, and held that they could not maintain separate actions for neglecting to surrender the principal.

3. By one partner against another, 1082.

4. Competency, 1084.

PART

IV.

First. Where several plaintiffs bring an action of *assumpsit*, unless they rely upon a contract expressly made with all, they must prove a joint interest, arising by implication, as by evidence that they are partners, and jointly interested in the subject-matter; for if a contract be made by the joint agent of all, or by one partner in behalf of all, they may sue jointly upon it, although their names have not been expressly mentioned (*s*). It must be proved that all who sue were partners at the time of the contract; one who has been subsequently admitted into the firm cannot join, although it be stipulated that he shall have a share in past transactions (*t*).

Actions by several.

The evidence of partnership usually consists in the oral testimony of clerks, or other agents or persons who know that the alleged partners have actually carried on business in partnership; it is unnecessary, even in criminal cases, to produce any deed or other agreement by which the co-partnership has been constituted.

Proof of partnership.

* Where several sue as indorsees of a bill, indorsed in blank, it is unnecessary to give any proof of their partnership or joint interest (*u*).

* 1068
Assignees of partners.

Where *A.* and *B.* being partners, their agent, after an act of bankruptcy by *A.* but before an act of bankruptcy by *B.*, paid a sum of money on the joint account to *C.*, it was held that the assignees under a joint commission could not recover this money as had and received to the use of *A.* and *B.* before they became bankrupts, or as money received to their use, as assignees since the bankruptcy (*x*), even although *A.* knew of the bankruptcy of *B.*; for a solvent partner may dispose of the partnership effects in discharge of a partnership debt (*y*). So if *A.* in such case,

(*s*) *Vide supra*, 635. 1047. In *Skinner v. Stocks*, 4 B. & A. 437, it was held that the action might be brought either in the name of the person with whom the contract was actually made, or in the names of the parties really interested. [*Supra*, 83, note (1).] Where two brought an action as partners, (with whom the defendant had frequently dealt,) and at the trial it appeared that at the time of the contract a third person, not joined, was a dormant partner, and that he had since withdrawn from the firm, Lord Kenyon refused to nonsuit the plaintiffs. *Leveck v. Shaftoe*, 2 Esp. C. 468.

(*t*) *Wilsford v. Wood*, 1 Esp. C. 182.

(*u*) *Rordasnz v. Leach*, 1 Starkie's C. 446; & *supra*, 250.

(*v*) *Smith v. Goddard*, 3 B. & P. 465.

(*y*) *Harvey v. Crickett*, B. R. Sittings at Serjeants Inn before Mich. Term, 57 Geo. III. Sel. N. P. 1660.

PART
IV.

Satisfaction
to one, &c.

after a secret act of bankruptcy by *B.*, dispose of the partnership effects for a valuable consideration, and afterwards commit an act of bankruptcy, the assignees of both under a joint commission cannot maintain trover against the *bona fide* vendee (*z*).

It is a good defence to show that one of several plaintiffs cannot recover, although he may have been guilty of fraud against the rest. Thus *A. B.* and *C.* cannot recover on a bill of exchange drawn by them, and accepted by the defendant, *A.* having (in fraud of his partners) engaged to provide for the acceptance when the bill should be due (*a*).

- * 1069 * Where *A.* was a partner with *B.* in one firm, and also with *C.* in another, and the firm of *A.* and *B.* indorsed a bill to *A.* and *C.*, and *B.* received securities from the drawer, on an undertaking by *B.* that the bill should be taken up and liquidated by the house of *A.* and *B.*, it was held that *A.* being bound by the act of his partner, could not, in conjunction with *C.* maintain an action on the bill against the acceptors (*b*). So if one partner be precluded by the illegality of his act from recovering in the particular transaction, his partners, although innocent, cannot recover (*c*).

Thus if goods be sold and packed by a partner living in Guernsey, for the purpose of being smuggled into this country, the partners who live in England, although ignorant of the transaction, cannot, jointly with the other, maintain an action for the goods, for the act of one partner is the act of all (*d*).

By one of
several.

The non-joinder of a co-contractor as plaintiff, is, in general, a ground of nonsuit.

(*z*) *Fox v. Hanbury*, Cowp. 449.

(*a*) *Richmond v. Heapy*, 1 Starkie's C. 102; where it was held by Lord Ellenborough that the parties could not sue out a commission of bankruptcy founded upon that debt (*Johnson v. Peck*, Cor. Holroyd, J. Lancaster Summer Assizes, 1821). So where *A.* being indebted to *B.* and *C.*, allowed the amount on the settlement of a private account between himself and *C.*, and the latter gave a receipt to *A.* for the amount, it was held that this was a good discharge (*Henderson v. Wild*, 2 Camp. 561). But where such a receipt was given after notice in the Gazette of the dissolution of partnership between *B.* and *C.*, and that debts were to be paid to the former only, it was held to be fraudulent, and void. *Ibid.* and afterwards by the Court of K. B.

(*b*) *Jacaud v. French*, 12 East, 317.

(*c*) 3 T. R. 454.

(*d*) *Biggs v. Lawrence*, 3 T. R. 454. See *Clugas v. Penultima*, 4 T. R. 466. *Waymell v. Reed*, 5 T. R. 599.

A surviving partner cannot recover in *assumpsit* without naming his deceased partner in the declaration (e), for there is a variance. But where money is owing to two partners, and after the death of one it is paid to a third person, the survivor may maintain *an action for money had and received to his own use (h). The party with whom the contract has been expressly made may alone sustain the action, although it turn out that another person, whose name was not mentioned, is secretly interested (i).

PART
IV.

Action by one,
&c. Defence.
* 1070

Where business has been carried on in the names of several, one of them may still support an action of *assumpsit*, provided he expressly prove that the others were not in fact partners (k); and a party in whose name the business has been carried on as a co-partner is competent to prove that in fact he was not a partner (l).

By several.

Secondly. In an action against several, upon a contract on which they are liable as partners, the proof of partnership usually consists in evidence that they have acted as partners in the particular business. Less evidence is usually sufficient in this case than is requisite, where partners sue as plaintiffs, for there they are cognizant of all the means by which the fact is capable of being proved; but where they are sued as defendants the plaintiff may not be able to ascertain the real connexion between the parties; it is sufficient for him *to show that they have acted as partners (k), and that by their habit and course of dealing,

Against
several.
Proof of
partnership.

* 1071

(e) *Jell v. Douglas*, 4 B. & A. 374. *Richards v. Heather*, 1 B. & A. 29. *Webber v. Tivill*, 2 Saund. by Serj. Will. 121, n. 1. *Israel v. Simmons*, 2 Starkie's C. 356.

(h) *Smith v. Barrow*, 2 T. R. 476.

(i) *Lloyd v. Archboule*, 2 Taunt. 324. *Mawman v. Gillett*, ib. 325. And per Sir James Mansfield, *ibid.* "If you can find out a dormant partner you may make him pay, because he has had the benefit of your work; but a person with whom you have no privity of communication shall not sue you." See *Leveck v. Shaftoe*, 2 Esp. C. 468. *Lucas v. De la Cour*, 1 M. & S. 249. [*Supra*, 83, and *note.*] A retired partner need not be joined, although his name be retained in the firm. *Atkinson v. Laing*, 1 D. & R. 16.

Vide etiam, *Fitzgerald v. Boehm*, 6 Moore, 332; *Golding v. Vaughan*, 2 Chitt. R. 436.

(k) The banking trade was carried on in the joint names of the father and son, and the accounts were headed in their joint names in the banking-books; and it was held that the father could not maintain a separate action without proof that the son (although proved to be a minor) had no share in the business. *Teed v. Elworthy*, 14 East, 210.

(l) *Glossop v. Colman*, 1 Starkie's C. 25.

(k) Even although the partnership is by deed (*Alderson v. Clay*, 1 Starkie's C. 406). To make one liable as partner, there must

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IV.

* 1072

Proof of
partnership.

conduct and declarations, they have induced those with whom they have dealt to consider them to be partners. Hence if a person has represented himself to be a partner, * and has been trusted as such, he is bound by that representation, and it is no defence for him to show that he was not in fact a partner (*l*). One who lends his name to a firm, although he receives no part of the profits of the trade, is liable on the engagements of the firm (*m*), to one who is ignorant of the real fact (*n*).

Where bills drawn on *A.* and Co. are accepted by *B.* in the name of *A.* and Co., it is evidence against *B.* that he is a partner (*o*).

either be an actual contract to share in profit and loss, or he must have permitted his credit to be pledged by the use of his name as a partner (*Hoare v. Dawes*, Doug. 371). An agreement to share profits alone raises a liability, in point of law, to losses with respect to creditors (*Hesketh v. Blanchard*, 4 East, 146. *Waugh v. Carver*, 2 H. B. 247). Where a debtor and creditor agree to be jointly concerned in an adventure abroad, which is to be purchased by the debtor, and the returns are to be paid to the creditor in satisfaction of the debt, both are liable as partners to vendors from whom the debtor in consequence purchases goods abroad. *Gouthwaite v. Duckworth*, 12 East, 421. And see *Waugh v. Carver* 2 H. B. 235.

The communion of profit and loss is the true test of partnership. An agreement by several to take aliquot parts of a commodity to be purchased by *A.*, where there is no agreement for a re-sale, does not make them partners (*Coope v. Eyre*, 1 H. B. 37). An agent whose wages are paid by a proportion of the profits, is not a partner (*Meyer v. Sharpe*, 5 Taunt. 74). Joint-proprietors of a coach, each of whom provides horses for his own stage, but who share the gross proceeds, are not, it seems, jointly liable for goods supplied for the horses (*Barton v. Hanson*, 2 Taunt. 49); but *qu.* whether the particular agreement *inter se* was not known. Where *A. B. C.* and *D.* were partners in a coach-concern, but *A.* provided coaches and horses at a certain allowance per mile, it was held that *A.* alone was liable for the repairs of the coach to one who knew the agreement, although the names of all appeared on the coach (*Hiard v. Bigg & another*, per Holroyd, J. Winch. Sp. Assizes, 1819, Mann. Ind. 230). But they are jointly liable to one who sends goods (*ibid.*) So for any damage done in the management of the coach. *Ibid.* And see *Waland v. Elkins*, 1 Starkie's C. 272.

It frequently happens that a partner in a firm may be considered a third person in transactions between the firm and a party with whom the firm deals (per Eyre, C. J. *Botton v. Puller*, 1 B. & P. 546, 7). [*Gill & al. v. Kuhn*, 6 Serg. & Rawle, 333.] But in actions by the firm, the liability of any one partner as a defendant is a bar to the action. *Supra*, 278, (*p*), and 1068.

(*l*) As to the general principle, *vide supra*, 31.

(*m*) *Guidon v. Robson*, 2 Camp. 302.

(*n*) *Alderson v. Pope*, 1 Camp. 404, *n.* See *Teed v. Elworthy*, 14 East, 214.

(*o*) *Spencer v. Billing*, 3 Camp. 312. And it was said that it may

A party cannot be liable as a partner unless he was a partner at the time of the contract; and therefore although the acts and admissions of a party, made subsequently to a contract, may be used as evidence to show that he was a partner at the time of the contract, yet if it be clear that he was not then a partner, no subsequent admission will render him liable in point of law (*p*). Thus one who has been admitted into the firm is not responsible for goods previously sold and delivered, even although he acknowledge his liability, and accept a bill for the amount (*q*).

PART
IV.
—
Proof of
partnership.

Although the declaration or admission of each individual member of a firm, that he is a partner, is evidence to charge himself, it is no evidence of the fact against any other party (*r*).

An affidavit for the registry of a ship, made by *A*. * stating that *A*. and *B*. are the owners, is not evidence of the fact against *B*. (*s*). * 1073

Where two of three defendants in *assumpsit* were outlawed, it was held that a letter written by the third, who had pleaded *non assumpsit*, in which he admitted the partnership, was evidence of the fact (*t*). Admissions.

An admission by *A*. in the discussion of a particular transaction, that he is a partner with *B*., is not evidence to bind him as a partner in any other matter unconnected with the particular transaction (*u*). But if *A*. publicly and generally represent himself to be the partner of *B*. it will be evidence to prove his liability as a partner on a contract unconnected with the real object of the partnership (*x*).

Where *A*. made an entry, at the excise office, of himself and *B*. as joint dealers in beer, according to the sta-

be shown that bills have been invariably accepted in this way, without producing them, per Lord Ellenborough, C. J.

(*p*) *Saville v. Robertson*, 4 T. R. 720.

(*q*) *Ibid*. But he would be liable on the bill.

(*r*) *Vide supra*, 47.

(*s*) *Tinkler v. Walpole*, 14 East, 226. *M'iver v. Humble*, 16 East, 169. *Flower v. Young*, 3 Camp. 240. *Smith v. Fuge*, 3 Camp. 456. *Ditchburn v. Spracklin*, 5 Esp. C. 31. [and Mr. Day's note]. An unsigned entry in the office for licensing stage-coaches is not evidence that the persons named in the license are the owners (*Strother v. Willan*, 4 Camp. 24). The entry of a cart in the books of a tax-gatherer, as the joint property of *A*. and *B*., is not evidence against them, without proof that they authorized the entry. *Weaver v. Prentice & another*, 1 Esp. C. 369.

(*t*) *Sangster v. Mazaredo*, 1 Starkie's C. 161.

(*u*) *De Berkow v. Smith*, 1 Esp. C. 29, Cor. Lord Kenyon, C. J.

(*x*) *Ibid*.

PART
IV.Admissions,
&c.

tute, it was held that this was not conclusive evidence of the partnership, in an action by a private person against *A.* (*y*) ; but with respect to the crown the entry would have been conclusive against *A.* (*z*).

- * 1074 The record of an issue out of the Exchequer, to try the fact of the partnership of *A.* and *B.* has been * admitted as evidence in an action against *A.* and *B.* to charge them as partners (*a*).

When the fact, that several parties are partners, has once been established, the act or declaration of one partner relating to the subject-matter of the partnership is evidence against the rest ; although the partner whose acts or declarations so given in evidence be no party to the suit (*b*), or although the admission be made after a dissolution of the co-partnership (*c*) (1).

The principles upon which the admissibility of such evidence depends, and some of the decisions on the subject, have already been referred to (*d*).

(*y*) *Ellis v. Watson & others*, 2 Starkie's C. 453.

(*z*) *Ibid*.

(*a*) *Whitley v. Menheim & Levy*, 2 Esp. C. 608. The proceedings in the exchequer suit would clearly be evidence against the party who alleged the partnership ; such evidence would operate by way of admission. But *qu.* how far the record would be evidence of the fact as against the defendant, who denied the partnership ; as to him, it should seem that the record would, in principle, have no more operation than it would have had in case he had contested the fact of partnership with a stranger. *Vide supra*, Vol. I. p. 195.

(*b*) *Supra*, 45 ; and *Thwaites v. Richardson*, Peake's C. 16. *Whitcomb v. Whiting*, Doug. 652. Such an admission, in order to take the case out of the Statute of Limitations, ought to be clear and unequivocal. Per Lord Ellenborough, *Holme v. Green*, 1 Starkie's C. 488. But see *Booth v. Janney*, 7 Price, 193, and the next note.

(*c*) *Wood v. Braddick*, 1 Taunt. 104.

(*d*) The question to what extent the acts of one partner are binding upon another, with reference to the subject-matter of the co-partnership, is one of law. One partner may bind another partner in trade by drawing or accepting bills of exchange (*supra*, 229, note (*h*)), unless the latter give express notice that he will not be bound, or unless *covin* be practised between the partner and the taker of the bill (*ibid*). One partner has not authority to bind another by deed (*Harrison v. Jackson*, 7 T. R. 207 ; [*Green & al. v. Beale*, 2 Caines' Rep. 254]), or by a guarantee of the debt of a third person (*Duncan v. Lowndes*, 3 Camp. 478). A part-owner of a ship has no authority to insure on account of the rest, although a partner has (*Hooper v. Lusby*, 4 Camp. 66.) One partner in a contract with government, has no authority to pledge goods consigned to him by another partner, for the purpose of performing the contract

(1) [See *Ante*, Vol. II. p. 45. notes.]

PART
IV.

* It is sufficient to prove that a co-defendant in *assumpsit* is a dormant partner with the rest (e).

But it is not sufficient to show that one of the defendants became a partner after the time of the contract, or that he was by agreement afterwards permitted to share in the adventure (f).

As the authority of one partner to bind another is merely presumptive, the presumption may be rebutted by evidence that the partner gave express notice to the plaintiff that he would not be responsible for the acts of another. Thus if *A.*, being partner with *B.*, give notice to a creditor to deliver no goods to *B.* without *A.*'s concurrence, the creditor cannot recover for goods delivered to *B.* without proof that *A.* adopted the sale, or derived benefit from the goods (g).

Action against
Defence.
Notice.

Again, if one partner give notice that he will not be responsible for bills drawn in the name of the firm, he will not be liable to a party who takes such bills after the notice, even although the latter has given a valuable consideration for them (h).

Fraud.

(*Smith v. Burridge*, 4 Taunt. 684). One partner possesses no general authority under a power of attorney granted to a co-partner. *Edmiston v. Wright*, 1 Camp. 88. See *Warner v. Hargrave*, 2 Roll. R. 393. 2 Ch. C. 202. *Parker v. Kett*, 1 Salk. 95.

The implied authority of one partner to bind another is generally limited to such facts as are in their nature essential to the general object of the partnership; as the borrowing of money for the defraying of the expenses of a partner in transacting the business of the house (*Rothwell v. Humphreys*, 1 Esp. C. 406), or the purchasing of goods, although one partner fraudulently converts them to his own use, unless the seller be privy to the fraud. *Bond v. Gibson*, 1 Camp. 185. [See *Marsh v. Gold & al.* 2 Pick. 285.]

The authority of one partner to bind another is merely presumptive, *Booth v. Janney & Quin*, 7 Price, 193. Note, the action there was against the firm, on a bill accepted by one Quin, who had let judgment go by default; the defence by the other defendant Janney was, that the plaintiff had received previous notice of the dissolution of partnership; and the court of exchequer held that an answer in equity by Quin to a bill filed by Janney was not admissible evidence against Janney to show a continuance of the partnership; *sed qu.* and *vide Grant v. Jackson*, Peake's C. 203. *Wood v. Braddick*, 1 Taunt. 104.

An infant partner must, on attaining his age, having continued to be a partner up to that time, give notice, in order to relieve himself from future liability. *Goode v. Harrison*, 5 B. & A. 147.

(e) *Swan v. Steele*, 7 East, 209. *Grellier v. Neale*, Peake's C. 146. And per Sir J. Mansfield, in *Lloyd v. Archbottle*, 2 Taunt. 324.

(f) *Young v. Hunter*, 4 Taunt. 582.

(g) *Willis v. Dyson*, 1 Starkie's C. 164.

(h) *Lord Galsworthy v. Matthew*, 10 East, 264. [and Mr. Day's note]. *Supra*, 229, note (k).

PART
IV.Action against.
Defence.
Fraud.

* The presumption may also be rebutted by proof of fraud or covin between a co-partner and another (i). As by evidence that the bill was given by two or three partners in payment of a debt due from the two previous to their partnership with the third (k).

- * 1077 But where two firms carry on trade under the same name, one partner being common to both, the members of one firm will be liable on a bill drawn, accepted, or indorsed in the name common to both, although this has been done for the use and benefit of the other firm (l). Yet here the claim may, it should seem, be rebutted by evidence of fraud and covin between the partners in the firm, for whose benefit the bill is actually used, and the taker.

Dissolution.

Where the joint liability results not from a contract expressly made with all the defendants, but from the fact of

(i) *Supra*, 229, note (k).

(k) *Shireff v. Wilks*, 1 East, 48. It has been said, that the mere single circumstance that the bill has been given in discharge of the separate debt of one partner, is not in itself sufficient to raise a presumption of fraud, without some proof that it was without the assent of the rest (*Ridley v. Taylor*, 13 East, 175). There the bill was drawn for a larger amount than the particular debt, and it was known to the separate creditor that the indorsement was made by the hand of the partner so indebted to him, and direct evidence might have been given of fraud and covin if any had existed.

In the case of *Arden v. Sharpe & Gilson* (2 Esp. C. 524,) the plaintiff discounted a bill brought by Gilson, who desired that the business might be kept secret from his partner; and Lord Kenyon held that the action would not lie. And in *Wells v. Masterman*, Lord Kenyon said, that if a man have dealings with one partner only, and he draw a bill on the partnership on account of those dealings, he is guilty of fraud.

Where *A. B. and C.* carried on the cotton trade under the firm of *A. and B.* (*C.* not being known to the world as a partner), and *A. and B.* traded under the same firm as grocers, and a bill given to them in the cotton business was indorsed in the name of the firm common to both partnerships, and given in payment by *A. and B.* for goods received in the grocery business, it was held that *C.* was liable to pay the bill to the holders, although the indorsement was unknown to *C.*, of whom the indorsee had no knowledge at the time of the indorsement. *Swan v. Steele*, 7 East, 209.

Where one partner clandestinely drew and accepted a bill in the name of the firm, partly to discharge a debt due from the partnership, and partly to discharge his own private debt, it was held that the payee could recover no more than the debt due from the firm, although money had been paid into court on the count on the bill. *Barber v. Backhouse*, Peake's C. 61. See also *Green v. Deakin*, 2 Starkie's C. 347.

(l) *Baker v. Charlton*, Peake's C. 80. *Swan v. Steele*, 7 East, 209, and *supra*, u. (k). Although one be but a dormant partner. *Ibid.*

PART
IV.

* 1078

Defence.
Dissolution.

their partnership, it is competent to the defendants to prove a *dissolution* (m) of the co-partnership previous to the contract; this however will not be in itself sufficient where the defendants have openly * acted as partners, unless *notice* to the plaintiffs of the dissolution be also proved. It is sufficient if the plaintiff in the first instance prove a partnership at a time anterior to the contract, when that is once established, a continuance of the partnership is to be presumed, until a dissolution be proved, and proof of a dissolution will still be insufficient unless reasonable proof be given of notice of the fact to the plaintiff; for although the partnership may in fact have been dissolved, yet if the parties do not announce it, they by their silence induce strangers to trust to the joint credit of the firm as before.

Where a minute of an agreement between partners to dissolve the partnership, made in order to be advertised in the Gazette, and signed by the parties, and attested, is produced in evidence to prove the dissolution, an agreement stamp is necessary.

Where express notice has been given of the dissolution Notice.
of the partnership to those with whom the firm have had any dealings (a measure which in prudence ought never to be neglected), the notice must of course be proved in

(m) The authority of one partner to bind another in respect of partnership property ceases on the dissolution of the partnership. Where, on the dissolution of partnership between *A.* and *B.*, the latter was intrusted with the settlement of the affairs, it was held that he could not indorse, in the name of the firm, a security which was part of the joint effects (*Abel v. Sutton*, 3 Esp. C. 108, Cor. Lord Kenyon. *Kilgour v. Finlayson*, 1 H. B. 155); and *qu.* whether *A.* would have been liable on the indorsement, although made during the partnership, if not negotiated until after the dissolution. See *Kilgour v. Finlayson*, 1 H. B. 155.

Where *A.* a partner with *B.* and *C.* drew a blank bill in the name of the partnership firm, payable to their order, and delivered it to their clerk to be used according to exigency, and *A.* died, and *B.* and *C.* assumed a new firm, and the clerk, inserting a date previous to the death of *A.*, circulated the bill, it was held that *B.* and *C.* were liable to a *bona fide* holder, although they had received no value for the bill. *Usher v. Dauncey & others*, 4 Camp. 97; and the court of K. B. refused a new trial. [See *Putnam v. Sullivan*, 4 Mass. Rep. 45.]

Where *A. B.* and *C.* being partners, ordered goods from abroad, and afterwards dissolved partnership, and assigned their property to trustees for the benefit of creditors, and *A.* and *B.* acted as agents to settle the affairs of the firm, and the goods arrived, and were delivered to *A.* and *B.*, in an action against *A. B.* and *C.* for the freight, it was held that *C.* was not liable. *Pinder v. Wilks*, 1 Marsh. 248.

(n) *May v. Smith*, 1 Esp. C. 283.

PART
IV.

Notice.

* 1079

Notice of dissolution.

the usual way (o). Such notice may also be proved by means of an advertisement in the Gazette, or in a public newspaper; but a newspaper containing such a notice cannot be read in evidence without previous proof either that the plaintiff read an impression of the same paper, or at least that he was in the general habit of reading that paper (p). And notice in the Gazette, if admissible at all, is very weak evidence, if it be not supported by *some evidence to show that the plaintiff saw the Gazette (a).

There seems indeed to be little if any difference between a notice in the Gazette and a notice in any other newspaper, with respect to contracts of partnership, and other matters which are not of a public and official nature (q).

Proof of notice is still requisite, although the plaintiff had no dealings with the partners previous to the actual dissolution of partnership (r). But it seems that if notice be given to all the parties with whom the partners have dealt, and be also advertised in the Gazette, it will be presumptive evidence of notice against one who had no previous dealings with the firm (s).

Where notice of dissolution has been published in the Gazette, and has been given to the proper parties, the retiring partners are not liable on a contract subsequently made by one of the former firm, although he carries on business in the name of the former firm, unless it can be proved that they either interfered in the business subsequently to the dissolution, or authorized the use of their

(o) *Supra*, 974. Where printed circular letters have been sent, or duplicates made out, it would be sufficient to produce and prove a duplicate original; but it might still be proper to give notice to produce the original. *Supra*, tit. *Notice*.

(p) *Jenkins v. Bizard & another*, 1 Starkie's C. 418. *Seemle*, that notice in the Gazette is notice to all the world. *Wright v. Pulham*, 2 Chitty's R. 121.

(a) *Godfrey v. Macauley*, Peake's C. 155, n.

(q) See note (s).

(r) *Parkin v. Carruthers*, 3 Esp. C. 248. There the retiring partner allowed his name to continue in the firm. *Gorham v. Thompson*, Peake's C. 42. *Graham v. Hope*, Peake's C. 154.

(s) See *Newsome v. Coles & others*, 2 Camp. 617. *Godfrey v. Turnbull*, 1 Esp. C. 371; where an advertisement in the Gazette is said to have been considered to be presumptive evidence of notice. But see another report of the same case, intitled *Godfrey v. Macauley*, Peake's C. 155, n.; from which it seems that the jury were directed to consider the probability that the plaintiff had seen the Gazette. [See *Shaffer & al. v. Snyder*, 7 Serg. & Rawle, 503.]

would be sufficient to establish their partnership in a suit by a stranger, will raise a presumption of the fact of partnership *inter se* (i).

PART
IV.

Although one partner cannot maintain an action against another, whilst the partnership accounts remain unliquidated, it is otherwise where the accounts have been settled and a balance struck, or even where one insulated transaction alone remains, or where the cause of action arises out of a transaction perfectly distinct from the general dealings (k).

Actions *inter se*.

* Where the plaintiff and defendant agreed to buy goods * 1083 on their joint account, the defendant undertaking to furnish the plaintiff with half the amount in time for payment, and the plaintiff paid the whole, it was held that an action lay for the moiety, although an account was still to be taken between them as partners, on the subsequent disposal of the stock (l). So if one partner wrongfully carry money belonging to the other to the joint account, an action lies for money had and received (m).

Where B. ordered goods on his own credit to be shipped by A. on an agreement between them that if any profit arose, B. should have half for his trouble, and goods were ordered, and afterwards paid for by B., it was held that he might recover the amount of such payment from A. who had not accounted to him for the profits, the contract

(i) Per Lord Ellenborough, *Peacock v. Peacock*, 2 Camp. 45. The father told the son, on his coming of age, that he should have a share in the business, the son acted as a partner for five or six years. Upon an issue out of chancery to ascertain the son's share of the profits, it was not *presumed* that he was entitled to a moiety, but it was left by Lord Ellenborough to the jury, to say to what proportion he was fairly entitled under the particular circumstances. Note that Lord Eldon, C. was not satisfied with this decision. See 16 Ves. 56.

(k) See the cases referred to, *supra*, 124. A demand against a surviving partner as such may be joined with a demand due from him individually. *Golding v. Vaughan*, 2 Chitty's R. 436. *Supra*, 1070. But an action is not maintainable by one partner against another where a bill of exchange has been given in respect of an unascertained balance. *Verly v. Saunders*, 1 Chitty's R. 127. And an indorsee who takes the bill after it is due, cannot recover. *ib.*

An agent employed by a company of subscribers for an application to parliament for an intended railway, being himself a subscriber, cannot maintain an action for his services, either against the body of subscribers, or against the chairman. *Holmes v. Higgins*, 1 B. & C. 74.

(l) *Venning v. Leckie*, 13 East, 7. [and Mr. Day's note.]

(m) *Smith v. Barrow*, 2 T. R. 476.

PART
IV.Actions inter
se.

not constituting a partnership *inter se*, but an agreement for compensation for trouble and credit (n).

Where an account is taken at the dissolution of a partnership, *assumpsit* will lie without proof of an express promise (o).

Notice by one partner that the partnership has been dissolved, is evidence against that partner that it has been dissolved by competent means, even by a deed, if a deed be essential (p); and in such case an ejectment lies, upon the demise of one co-partner, against another, for a house agreed to be occupied jointly during the partnership, without proof of a notice to quit (q).

* 1084
Competency.

* In general, a co-partner with the defendant in the subject of the action is incompetent to be a witness for the defendant, where a verdict for the plaintiff would diminish the joint property, or he would be liable to any part of the costs; even although the tendency of his evidence be to charge himself with the whole debt (r). But in order to raise this objection, it must be shown that he is a partner; it is not sufficient merely to suggest it (s). Thus, in an action for goods sold and delivered, a witness is competent to prove that the goods were supplied for his credit, and for his use, although it be suggested that he is a partner with the defendant (t).

A party is competent, although he has purchased from the plaintiff an interest in the contract on which the action is brought (u).

Upon a plea in abatement in *assumpsit*, for goods sold and delivered, that the promises were made jointly with E. F. the latter, it has been seen, is a competent witness for the plaintiff (x) (1).

(n) *Hesketh v. Blanchard*, 4 East, 143.

(o) Per Gibbs, C. J. *Rackstraw v. Imber*, Holt's C. 368.

(p) *Doe d. Waithman v. Miles*, 1 Starkie's C. 181. [4 Camp. 373. S. C.]

(q) *Ibid.*

(r) See *Birt v. Hood*, 1 Esp. C. 20. *Young v. Bairner*, 1 Esp. C. 103.

(s) *Ibid.*

(t) *Birt v. Hood*, 1 Esp. C. 20.

(u) *Supra*, 782.

(x) *Hudson v. Robinson*, 4 M. & S. 475, *supra*, 5.

(1) [In an action against A. B. and C. on a bill of exchange, drawn by C. on A. and B. payable to the plaintiff, to be placed to the credit of a certain vessel, one of the counts in the declaration

PAYMENT.

PART
IV.

Proof of payment of the debt is evidence under the general issue in *assumpsit* (x), but must be pleaded specially as a bar to an action on a debt by record or specialty.

Upon issue taken on a plea of payment, the *onus* of proof lies on the defendant. The proof is either general, under the plea of *solvit post diem*, or special, under the plea of *solvit ad diem*.

* The party must prove, 1st, a payment of the money, or its equivalent; 2dly, its application to the particular debt (1). * 1085
Direct Evidence.

The proof of payment is either *direct*, or *presumptive*; in the former case it is made either to the plaintiff or to his agent.

Where a receipt has been given for the money, the receipt must be produced, and proof must be given of the hand-writing of the party to whom the payment was made.

A receipt is merely *prima facie* evidence of payment; it may be proved that it was obtained by fraud, or mistake (y).

Where the payment has been made to an agent, an authority from the principal to the agent must be proved; the agent is a competent witness for that purpose (z). Of payment to an agent.

(x) *Supra*, 128.

(y) *Stratton v. Rastall*, 2 T. R. 366; & *supra*, 1045.

(z) *Supra*, 767.

of which charged the defendants as owners of the ship, and another that C. drew the bill as agent for the defendants; it was held that C. was not a competent witness to prove the partnership of the defendants in the ship. *Miller v. M^cClenachan & al.* 1 Yeates, 144. A partner in a company is not admissible to prove that another person, defendant in the case, is also a partner—especially where there are written articles. *The State v. Penman*, 2 Desauss. 1. A dormant partner, not being a party to the suit, is a competent witness for the other partner in an action by him to recover the price of goods sold, where the interest of the dormant partner was, at the time of the contract, unknown to the defendant. *Clarkson v. Carter*, 3 Cowen, 84.]

(1) [In Pennsylvania, the defendant is permitted, under the plea of payment in an action on a bond, to give in evidence mistake or want of consideration. *Swift v. Hawkins & al.*, 1 Dallas, 17. So if notice be given to the plaintiff, fraud in the execution or consideration of a bond may be given in evidence. *Baring v. Shippen*, 2 Binney, 154. Or other matter, which shows that *ex aquo et bono* the plaintiff ought not to recover. See cases collected in Wharton's Digest, 467, 468. *Carpenter v. Groff*, 5 Serg. & Rawle, 162.]

PART
IV.

Whether such authority has been given to an agent to receive payment, or to receive it in a particular manner, are usually questions of fact for the Jury (a). Such an authority may be implied from the relative situation of the principal and agent, the habit and course of dealing between the parties, or from some recognition by the principal, of the authority of the agent subsequent to the payment (b) (2).

Where a principal intrusts an agent with the sale of goods, as to sell them in a shop, or of a horse at a fair, a presumption arises that he empowered that agent also to receive payment (c). So payment to a broker who makes out the bought and sold notes to the buyer and seller, is a payment to the principal (d).

* 1086
Proof of
agent's
authority.

* So, as has been seen, the authority of an agent to receive payment on bonds, bills, or other securities, is usually evidenced by the agent's possession of the instruments which are delivered up or cancelled upon payment (e).

Where the question is, whether the person who received money on a security was the agent of the owner for that purpose, it is not essential to call the agent himself (f);

(a) *Supra*, 59.

(b) *Supra*, 55.

(c) 12 Mod. 230.

(d) *Favenc v. Bennett*, 11 East, 36. *Vide infra*, 1087, 8. In general, if an agent be employed to receive money, and the debtor pays in money, he is discharged, but if the debtor does not pay in money, but settles the account by considering a debt due to him from the agent as paid, it is no discharge, per Abbott, C. J. in *Todd v. Reid*, 3 Starkie's C. 16. And therefore, where a broker adjusts a loss with the underwriter, and his name is struck out of the policy and adjustment, the broker becoming bankrupt within the month, the underwriter cannot set off against the assured the balance due to him from the broker at the time of adjusting the policy. *Ib.* and see *Russell v. Bangley*, 4 B. & A. 395; *Jell v. Pratt*, 2 Starkie's C. 57.

(e) *Supra*, 58.

(f) See *Owen v. Barrow*, 1 N. R. 101; where, in an action on the Statute of Usury, Chambre, J. said, "I should be sorry to have it

(2) [Where A. and B. agreed to sell and convey land to C., and the payment was made to A., who in fact had no legal title to the land; it was held that B. could not afterwards object to such payment, but that it was to be considered, in effect, the same as if paid to B. *Waters v. Travis*, 9 Johns. 450.

A. having constituted B. his general agent in a county, and also given him a particular agency to sell a tract of land, and receive payments of part of the purchase money, is bound to allow credits for any other payments made to him before notice that his powers are revoked. *Spencer & al. v. Wilson*, 4 Munf. 130.]

the possession of the security, by a third person, and receiving payment for it, and giving a receipt for it in the name of the principal, afford strong presumptive evidence that he was employed as agent for that purpose (g).

PART
IV.

Where payment has been made to an attorney, proof should be given of his employment by the plaintiff.

Proof of
agent's
authority.

Payment to a country attorney who is merely employed by the attorney of the principal to execute the writ, is insufficient (h); so is a payment which is made to an attorney on record, who has never been employed by the plaintiff (i); but payment to the attorney really employed by the plaintiff, but after he has been privately * changed without leave of the Court, is a good payment (k) (1).

* 1087

laid down as a general rule that agency must be proved by the agent himself."

(g) *Owen v. Barrow*, 1 N. R. 101. The action was to recover penalties for usury in discounting a bill of exchange; in proof of the receipt of the money, it was proved that B. had commenced an action against the acceptor, and that he had received from him the amount of the bill and costs, on producing the bill, and that he had given a receipt in the name of the defendant; and this was held to be good *prima facie* evidence, without producing the proceedings in the action.

(h) *Yates v. Freckleton*, Doug. 623.

(i) *Robson v. Eaton*, 1 T. R. 62.

(k) *Powell v. Little*, 1 Bl. Rep. 85.

(1) [In general, payment to the attorney at law is good, on the custom of the country, especially if he have possession of the bond, &c.; though under particular circumstances, this rule might not apply; as if notice were given that no such power was vested in the attorney. *Hudson v. Johnston*, 1 Wash. 10. The attorney at law who obtained the judgment, is, in general, authorized by the custom of the country to receive from the defendant the money recovered, and his receipt will discharge the judgment, though more than a year and a day elapsed between the date of the judgment and the time of payment to the attorney. *Branch v. Burnley*, 1 Call, 147. See *Wycoff v. Bergen*, 1 Cox's Rep. 214. Where a judgment has been recovered in any court of law, the attorney of record of the judgment creditor has authority to receive payment, and to discharge the judgment. *Lewis v. Gamage & al.*, 1 Pick. 347. *Langdon & al. v. Potter & al.*, 13 Mass. Rep. 319. See *Jackson v. Bartlett*, 8 Johns. 361. *Kellogg v. Gilbert*, 10 Johns. 220. *Cray v. Turner*, 6 Johns. 51. *Richardson v. Talbot*, 2 Bibb, 382.

Payment to the plaintiff's attorney of the sum for which judgment was obtained, if made within a year after execution is extended on land, is held, in Maine, to be a good bar to a writ of entry afterwards brought by the creditor against the debtor for the land. *Gray v. Wass*, 1 Greenleaf, 257.

Payment, by an officer, of money collected on an execution, to the creditor's attorney of record, but whose power had been re-

PART
IV.To agent.
Mode, &c.

Where payment has been made to a servant or other agent, in a cheque or bill, it is a question of fact whether the agent had authority to receive such a payment (l). And where the payment has been made according to the usual practice in similar cases, such an authority is, it seems, to be presumed (m). And in general, slight evidence of acquiescence on the part of the master will serve to show his assent to any particular mode of payment (n).

If the broker sell goods as his own, and the vendee has no notice to the contrary, a payment to the broker is good, although the mode varies from that which was agreed upon (o).

If it be known that the party is but an agent, the payment will be good, if it be made according to the agreement (p),

(l) *Supra*, 59.

(m) *Ibid.* note (h).

(n) *Ward v. Evans*, Salk. 442; *supra*, 59.

(o) *Blackburn v. Scholes & another*, 2 Camp. 343. And see *De Leira v. Edwards*, cited 1 M. & S. 147. *Favenc v. Bennett*, 11 East, 36, *infra*, n. (p). So also if the principals have allowed the agent to act as the principal in the sale of the goods (*Coates v. Lewes*, 1 Camp. 444). So where the principals allowed the broker to draw bills in his own name (*Townsend v. Inglis*, Holt's C. 278. *Favenc v. Bennett*, 11 East, 36). So if the factor sell in his own name, the buyer may set off, as against the claim of the principal, the debt due to the factor (*George v. Clagett*, 7 T. R. 359. 2 Esp. C. 577). *Aliter*, if the buyer be informed of the principal before the whole of the goods are delivered (*Moore v. Clementson*, 2 Camp. 22). Where a party sells in the character of an agent, although without disclosing the name of his principal, yet, if the disclosure be made before payment, the effect seems to be the same as if the name of the principal had been disclosed on the face of the contract. See Lord Ellenborough's observations, 4 M. & S. 573.

(p) *Favenc v. Bennett*, 11 East, 36. The goods were sold for a principal not named, on the terms of "payment in one month money," and the Jury found that the meaning of the terms, in commercial understanding, was payment at any time within a month, and that the payment within the month to the brokers with whom the defendant had dealt, without the knowledge of the principal, was a good payment. But it is otherwise if the payment vary from the terms of the original contract. *Campbell v. Hassell & others*,

voked before the officer received the execution, is not a discharge of the officer, but he is still liable to the creditor. *Parker v. Downing*, 13 Mass. Rep. 465. See also *Wurt v. Lee*, 3 Yeates, 7. Where an attorney indorsed on an execution that he had received the note of a stranger, for a greater amount than the judgment, payable to the judgment debtor, which he (the attorney) was to collect, but which was lost by his negligence; it was held that the judgment was not discharged. *Langdon & al. v. Potter & al.*, ubi sup. *Commissioners v. Rose*, 1 Desaus. 461. S. P.]

and without notice from the principal * not to pay to the broker (q); and even where such notice has been given, payment to the agent will still be good if the principal, on the balance of account, be indebted to the factor, for he has a lien on the debt (r).

* The effect of a bill or note in payment has already been * 1089 considered (s) (1).

1 Starkie's C. 233; and evidence of an usage to substitute an equivalent mode of payment is inadmissible.

(q) But although the factor sell in his own name, and without disclosing the name of his principal, yet, if the principal give notice to the buyer to pay him, and not the factor, the buyer will not be discharged in afterwards paying the factor (B. N. P. 130. *Houghton v. Matthews*, 3 B. & P. 485). See also *Powel v. Nelson*, cited 15 East, 65.

(r) *Drinkwater v. Goodwin*, Cowp. 251. In the case of *Schrimshire v. Aldertons* (Str. 1182), the Jury, contrary to the direction of the Court, in point of law, found that a payment to a factor who sold under a *del credere* commission, after notice by the principal to the contrary, was a good payment (and see B. N. P. 130), on the ground that the factor, in such a case, was to be considered to be the real principal with whom the contract was made. The circumstance, however, of a *del credere* commission, which is no more in effect than an agreement by the factor to insure the debt to his principal, cannot, it seems, at all affect the relative situation of the principal and the vendee. See *Morris v. Cleasby*, 1 M. & S. 576. 4 M. & S. 566. *Gurney v. Sharp*, 4 Taunt. 242. And see Lord Ellenborough's observations in *Cumming v. Forester*, 1 M. & S. 499; and the judicious observations in Mr. Long's book on Sales, 243, & seq. and the authorities there cited. *Vide etiam*, *Hudson v. Granger*, 5 B. & A. 27. The plaintiff sent goods to A. B. his factor, to whom he was indebted in a larger amount; the factor sold the goods to the defendant, to whom he was indebted in a larger amount; the factor became bankrupt, and his assignees settled with the defendant, and it was held to be an answer to the plaintiff's demand. *Hudson v. Granger* *ibid*.

As to payments made by a principal to a broker employed to buy for him, see above, p. 635; and see the case of *Powel v. Nelson*, 15 East, 65, cited by Lord Ellenborough. There the factor made purchases for his principal, who made payments on account; the vendor wrote to the factor for payment; the letter coming into the hands of the purchaser, he transmitted it to the factor, and afterwards paid him the remainder of the debt; and Lord Mansfield held that the principal was still liable to the vendor.

(s) *Supra*, 306.

(1) [A bill of exchange or promissory note, either of the debtor or any other person, is not payment of a precedent debt, unless it be so expressly agreed. *Greenwood v. Curtis*, 6 Mass. Rep. 358. 4 ib. 93. *Johnson v. Johnson*, 11 Mass. Rep. 361. *Goodenow v. Tyler*, 7 Mass. Rep. 36. *Murray v. Gouverneur*, 2 Johns. Cas. 438. *Herring v. Sanger*, 3 Johns. Cas. 71. *Johnson v. Weed*, 9 Johns. 310. *Schermern v. Loines*, 7 Johns. 311. *Tobey v. Barber*, 5 Johns. 68. *Sheehy*

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IV.

If a creditor desire his debtor to remit a bill or note by the post, it will be sufficient to prove that the debtor re-

Proof of payment by remittance, &c.

v. Mandeville & al., 6 Cranch, 264.^o Nor is a receipt for a note, as cash, evidence that it was taken as an absolute payment. 5 Johns. *ubi sup.* It is merely a suspension of the right of action during the time allowed for payment by the note. *Putnam v. Lewis*, 8 Johns. 389. And whether a note was taken absolutely as payment, or not, is a question of fact for the jury. 9 Johns. *ubi sup.* But the acceptance of a negotiable note, on account of a prior debt, is *prima facie* evidence of satisfaction. *Holmes & al. v. D'Camp*, 1 Johns. 34. *Pintard v. Tackington*, 10 Johns. 104. *Mancey v. M'Gee & al.* 6 Mass. Rep. 143. *Thatcher & al. v. Dinsmore*, 5 Mass. Rep. 299. *Chapman v. Durant & al.*, 10 Mass. Rep. 47. The reason assigned by the court of Massachusetts for this doctrine is, that otherwise the debtor might be put to inconvenience, and perhaps be obliged to pay his debt twice; as he could not set up a payment of his original debt, after a seasonable indorsement of the note, against the claim of an innocent indorsee. *Johnson v. Johnson*, *ubi sup.*

In *Wiseman & al. v. Lyman*, 7 Mass. Rep. 286, it was decided that if a creditor receive a note of a third person in payment of a demand against his debtor, where there is no fraud, such note is at the risk of the creditor, unless there be an agreement to the contrary; and he shall not afterwards have an action against the debtor on the original contract. In *Barelli v. Brown*, 1 M'Cord, 449, it was held, that the liquidation of an account by a note, though it be the note of a third person, unless expressly received in payment, does not destroy the open account. See also *Roget v. Merritt*, 2 Caines' Rep. 117. *Wilson v. Force*, 6 Johns. 110.

In general, a payment received in forged or worthless paper, or in any base coin, is not good; and if there be no negligence in the party, he may recover back the consideration paid for them, or sue on his original demand. See *Hargrave v. Dusenbury*, 2 Hawks, 326. *Markle v. Hatfield*, 2 Johns. 455. *Young v. Adams*, 6 Mass. Rep. 182. *Salem Bank v. Gloucester Bank*, 17 Mass. Rep. 1. *Gloucester Bank v. Salem Bank*, 17 Mass. Rep. 33. *Bank of the United States v. Bank of Georgia*, 10 Wheat. 333. But this principle does not apply to a payment made *bona fide* to a bank in its own notes, which are received as cash, and afterwards discovered to be forged. 10 Wheat. *ubi sup.* See also *Levy v. Bank of the United States*, 1 Binney, 27. S. C. 4 Dallas, 234.

In *Alexander v. Owen*, 1 T. R. 225, it was held that where goods were delivered under an agreement to take a specific parcel of copper money in payment, a delivery of such copper was a good bar to an action for the value of the goods, though it proved to be counterfeit money.

So in *Ellis v. Wild*, 6 Mass. Rep. 321, it was decided that if the innocent holder of a forged note sell it for merchandize, without any knowledge of its being forged, the buyer of the note cannot afterwards maintain an action against him to recover payment for the merchandize; for both parties being equally innocent *melior est conditio possidentis*. But in *Salem Bank v. Gloucester Bank*, *ubi sup.*, it is said, if the holder of the note had intended to buy merchandize, and the payment by the note had not been a part of the original stipulation, but an accommodation to him, then the forged note would not have been a payment, and an action would have been maintainable for the merchandize.]

mitted the bill as directed, and if it be lost the loss will fall upon the creditor (*t*). But in such case proof of a delivery of the letter not at the post-office, or at a receiving house, but to a bellman in the street, would not be a compliance with the creditor's directions, and the loss would fall on the debtor (*u*).

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In the absence of any direction by the creditor, it is said that the sending bills or notes by the post would be *prima facie* evidence to show that they were received by him (*x*). It is clear that in such a case it would be competent to the creditor to show that he had never in fact received the bills, and that they had fallen into other hands.

A payment made by compulsion of law is always sufficient to protect the party who made it from a second demand (*y*).

In an action of covenant against the defendant, the drawer of certain bills, to pay to the plaintiff the amount of his acceptances of bills so drawn, the possession by the plaintiff of bills accepted by him, and drawn by the defendant, is *prima facie* evidence that the plaintiff has paid them (*z*) (2).

Presumptive evidence.

The mere production of a cheque drawn by the *de- * 1090
fendant or his banker, and payable to the plaintiff or bearer, is no evidence of payment to the plaintiff, without proof that he received the amount (1), or that it was in his possession; but proof that he indorsed his name upon it affords *prima facie* evidence of payment to him (*a*).

The mere fact of the payment of money by *A.* to *B.* is

(*t*) *Warwick v. Noakes*, Peake's C. 67.

(*u*) *Hawkins v. Rutt*, Peake's C. 186.

(*x*) Peake's Ev. 289; where it is also observed, that where the creditor requires a remittance by the post, the sending bank-notes uncut would not discharge the debtor, since the more usual and prudent course is to send them by halves.

(*y*) *Supra*, 551, note (*c*).

(*z*) *Gibbon v. Featherstonhaugh*, 1 Starkie's C. 225.

(*a*) *Egg v. Barnett*, 3 Esp. C. 196.

(2) [The possession by the defendant of an order on him, signed by the plaintiff, to pay money to a third person, whose receipt is indorsed but not proved, if not objected to as evidence to go to the jury, may be charged by the court to be evidence of payment, though not conclusive. *Weidner v. Schweigart*, 9 Serg. & Rawle, 385.]

(1) [*S. P. Patton's Adm'ors v. Ash & al.*, 7 Serg. & Rawle. 116. *The People v. Howell*, 4 Johns. 296. *Dennie v. Hart & trustee*, 2 Pick. 204.]

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evidence.

presumptive evidence of the payment of an antecedent debt, and not of a loan (b).

Payment may be presumed from lapse of time. Under the statute of Limitations, lapse of time may, it has been seen (c), be pleaded as a bar to the action. Still the statute operates but presumptively, and the presumption may be rebutted by evidence of an admission of the debt, within the limit (d). And although the statute has not been pleaded, payment may be presumed by the Jury, from lapse of time and other circumstances, which render the fact probable (e).

Satisfaction of a bond may be presumed from a lapse of twenty years, without any demand or acknowledgment of the debt within that space (f), or in a shorter time if circumstances render satisfaction probable (g). But a lapse of twenty years is no legal bar, but merely affords a presumption in fact for the jury (h) (2).

The effect of an indorsement on a bond, of the receipt of interest, within twenty years, has already been considered (i) (3).

In the usual course of business, a security, where the money is paid, is either delivered up to the debtor, or destroyed, and therefore where the fact of payment is otherwise doubtful, the possession of the entire instrument by the creditor affords a presumption that it is still unsatisfied (k).

A receipt for rent due at one time affords a presumption that the rent due at an earlier date has been paid.

(b) *Welch v. Seaborn*, 1 Starkie's C. 474. So of a transfer of stock. *Breton v. Cope*, Peake's C. 30.

(c) *Supra*, tit. *Limitation*.

(d) *Ibid.*

(e) *Cooper v. Turner*, 2 Starkie's C. 397.

(f) 1 T. R. 270.

(g) [*Henderson v. Lewis*, 9 Serg. & Rawle, 379.] *Ibid.* *Colsell v. Budd*, 1 Camp. 27. 3 P. Wms. 287. *Rez v. Stephens*, 1 Burr. 434. 3 Burr. 1962. *Forbes v. Wale*, 1 Bl. Rep. 532. A surrender of a mortgaged term is not to be presumed from a period short of twenty years. *Doe v. Calvert*, 5 Taunt. 170.

(h) *Ibid.*

(i) *Supra*, 310. See also tit. *Release*. *Washington v. Brymer*, *Infra*, 1291, note (b), and Peake's Ev. Append. lxxiii. *Moreland v. Bennett*, Str. 652.

(k) *Bembridge v. Osborne*, 1 Starkie's C. 374.

(2) [See Vol. II. p. 310, note (1). The law does not positively presume payment of a judgment after nineteen years: That is a question for the jury. *Lesley & al. v. Nones*, 7 Serg. & Rawle, 410.]

(3) [See Vol. I. p. 311, note (1).]

Payment may also be presumed from the habit and course of dealing between the parties, as where the practice has been to pay wages, or for goods supplied weekly, and a demand is made at a distant time (l).

Application of
payment.

2dly. Where the payment is capable of different applications, proof is frequently necessary to show the application of the payment to a particular debt. The usual rule of law is, that the party who pays money has the power to apply it as he chooses, but that if he does not apply it, the party who received it may make the application (m). For these purposes, evidence is admissible of what passed at the time of payment, or of letters enclosing bills or money, and directing their application.

In some instances, the law applies the payment, or the intention of the party paying the money is inferred from the circumstances of the particular case; as where a trader owes 100*l.* and after he has ceased to trade, incurs a further debt, and then pays money on account, it will be set against the old debt (n).

* Where an old debt is due, and new debts are contracted, and payments are made from time to time, agreeing in amount with the new debts, a very strong inference

(l) *Lucas v. Novosilieski*, 1 Esp. C. 296. *Evans v. Birch*, 3 Camp. 10.—The action was for the proceeds of milk daily sold to customers by the defendant as agent to the plaintiff; and evidence was given that the course of dealing was for the defendant to pay to the plaintiff every day the money which she had received, without any written voucher passing; and upon this evidence Lord Ellenborough held that it was to be presumed that the defendant had in fact accounted, and that the *onus* of proving the contrary lay on the plaintiff.

(m) *Goddard v. Cox*, 2 Str. 1194. *Plomer v. Long*, 1 Starkie's C. 153. *Marryatts v. White*, 2 Starkie's C. 101. *Matthews v. Welwyn*, 4 Ves. 118. Cro. Eliz. 68. *Peters v. Anderson*, 5 Taunt. 420. *Hall v. Wood*, 14 East, 493. n. *Kirby v. Duke of Marlborough*, 2 M. & S. 18. *Bosanquet v. Wray*, 6 Taunt. 597. *Bodenham v. Purchas*, 2 B. & A. 39. [*Gwinn v. Whitaker*, 1 Har. & J. 754. *Munn v. Marsh*, 2 Caines' Rep. 99. *Smith v. Screven*, 1 M'Cord, 368. *Mayor, &c. of Alexandria v. Patten & al.* 4 Cranch, 316.]

A creditor is not bound to make an immediate application. *Simpson v. Bloss*, 2 B. & C. 65. And he is not bound by an entry in his book which he has not communicated, *ib.* and see *Cox v. Troy*, *Supra*, 235, note (r).

Where one of several partners dies, the partnership being in debt, and the firm is carried on by the survivors, who continue to deal with a former creditor, who blends the accounts, payments made from time to time are to be applied to the old debt, per Bayley, J. *Simpson v. Ingham*, 2 B. & C. 72.

(n) *Meggott v. Mills*, 1 Ld. Raym. 286. Comb. 463. *Supra*, 159. *Dawe v. Holdsworth*, Peake's C. 64.

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payment.

arises that the payments were made in respect of the new debts (*n*), especially in favour of a surety for the new debts (*o*).

Where a creditor has a legal claim on bills of exchange, and also an equitable claim on a mortgage assigned by a third person, and a payment is made by the debtor generally, without prejudice to his claim on any securities, it is to be presumed that the payment is in discharge of the *legal* debt (*p*).

Where a secret partner had retired from the firm, and bills given in payment for goods previously supplied to the firm were dishonoured, and new bills were given by the partners who continued in the firm, on the dishonoured bills being delivered up; it was held that these were to be considered as applicable to the old debts and not to new debts contracted since the dissolution (*q*).

Where a party placed in the hands of his banker the note of a third person, informing the banker that it was made for his accommodation, and afterwards paid in money generally, after which new credit was given by the banker, it was held that the banker could not recover from the maker more than the balance due on the note, after deducting the amount so paid in (*r*).

- * 1093 Where money is due from a debtor, as executor, and other money is due on his own private account, and he makes a payment generally, it must be applied to the former debt (*s*) (1).

(*n*) *Marryatts v. White*, 2 Starkie's C. 101.

(*o*) *Ibid.* per Lord Ellenborough. But it seems that the law will not apply a payment in favour of a surety, unless there be some circumstances to show that payments by the principal were intended to be made in discharge of the particular debt. *Plomer v. Long*, 1 Starkie's C. 153; and see *Kirby v. Duke of Marlborough*, 2 M. & S. 18.

(*p*) *Birch v. Tebbutt*, 2 Starkie's C. 74.

(*q*) *Newmarch v. Clay*, 14 East, 239.

(*r*) Per Lord Kenyon, *Hammersley v. Knowllys*, 2 Esp. C. 665.

(*s*) *Goddard v. Cox*, 2 Str. 1194.

(1) [Where a creditor has two demands against his debtor, and the debtor pays a sum of money without directing to which it shall be applied—if the amount paid exceed one of the demands, and is exactly equal to what remains due on the other, it will be considered as having been paid in discharge of that other. *Robert & al. v. Garnie*, 3 Caines' Rep. 14. If an agent, having blended a demand due to his principal with one due to himself, receives a general remittance from the debtor, it shall be applied towards the discharge of both debts in proportion. *Barrett v. Lewis*, 2 Pick.

Where a broker sold goods of *A.* and also goods of *B.* to *C.*, and the latter made a payment generally on account,

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payment.

123. Money paid by a debtor must be first applied to extinguish the interest, and the surplus, if any, to the principal—and the debtor has no election to make a different application. *Gwinn v. Whitaker*, 1 Har. & J. 754. See also *Norwood v. Manning*, 2 Nott & McCord, 395. So where one of two debts bears interest, and the other does not, the payment shall be applied to that bearing interest. *Bacon v. Brown*, 1 Bibb, 334. Where a person, indebted on bond and on judgment, sells land, and the purchaser thereof pays a sum of money to the creditor without application, the law will apply it to the judgment in exoneration of the land. *Gwinn v. Whitaker*, ubi sup: And it is said by the court in that case, that if a person is indebted on mortgage, or bond, or on simple contract, and makes a payment without particularly applying it, the law will make the application in the way most beneficial to the debtor. See also *Hill & al. v. Southerland's Ex'rs.* 1 Wash. 133. *Cremer v. Higginson & al.* 1 Mason's Rep. 338. Where one debt is guarantied, and another not, the creditor is not bound to apply a payment so as first to relieve the surety. *Brewer v. Knapp & al.* 1 Pick. 337.

There may be cases in which the debtor's right of directing the application of his payments to whichever debt he may choose would be completely exercised without any *express* direction given at the time. A direction may be evidenced by circumstances as well as by words: A payment may be attended by circumstances which demonstrate its application as completely as words could demonstrate it. A positive refusal to pay one debt, and an acknowledgment of another, with a delivery of the sum due upon it, would be such a circumstance. Per Marshall; *C. J. Tayloe v. Sandiford*, 7 Wheat. 20, 21. And a new trial was ordered in that case, because the court below had instructed the jury that the plaintiff was entitled to recover "unless they should be satisfied by the evidence that the defendant, at the time of paying the money, had *expressly* directed the same" to be applied towards payment of another debt.

Where money has been paid, and no application to particular debts directed by the debtor, or made by the creditor, if it become necessary for a court of equity to make the application, it will direct that those debts, for which the security is most precarious, be first extinguished. *Field & al. v. Holland & al.* 6 Cranch, 8.

Where a mortgagee of two parcels of land released one of them to an assignee of the mortgagor, he was held to apply the money, paid in consideration of such release, in discharge of so much of the sum due on the mortgage, although the mortgagor was still indebted to him on other accounts. *Hicks v. Bingham*, 11 Mass. Rep. 300. Where the creditor, by a general credit, applies a payment to the whole of the debtor's account, the practice is to deduct the credit from such part of the account as can be recovered in the suit then pending. *Hilton v. Burley*, 2 N. Hamp. Rep. 196. Per Woodbury, J. who questions the accuracy of the practice.

When a collector of revenue has given two bonds for his official conduct, at different periods, and with different sureties, a promise by the supervisor to apply his payments exclusively to the discharge of the first bond—some of the payments being for money collected and paid after the second bond was given—does not bind the U.

- PART IV.** insufficient to discharge both debts, and then became insolvent, it was held that the money so received was to be applied in proportion to the debts (t).
- Application of payment.** Where a creditor has several demands, some of which cannot be enforced because they are illegal, and money be paid generally, it will be applied to the legal demand (u).
- Solvit ad diem.** In the case of mortgages, bonds and other instruments, by which the party engages to pay money within a certain time, proof of payment on the last moment of the day will satisfy the allegation on issue taken on the plea of *solvit ad diem* (x).
- What will amount to payment under the circumstances of the particular case is a question of law (y).
- Payment of money into court.** The payment of money into court must be proved by the production of the rule for paying it into court (z). It is proved either by the plaintiff or the defendant.
- The effect of paying money into court, upon a special count, or generally, when the declaration contains a special count, is an admission of the right to *recover on that count, which supersedes the necessity of the usual proof of the making of the contract (a).
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(t) *Favenc v. Bennett*, 11 East, 36.

(u) *Ribbans v. Crickett*, 1 B. & P. 264. [See *Hilton v. Burley*, 2 N. Hamp. Rep. 193.]

(x) Per Lord Kenyon, in *Lefly v. Mills*, 4 T. R. 173, citing *Hudson v. Barton*, 1 Roll. R. 189. *Duppa v. Mayo*, 1 Saund. 287. Moor, 122, pl. 166. 2 Salk. 578.

(y) Payment in notes which turn out to be worthless is no payment in law. *Owenson v. Morse*, 7 T. R. 64. *Brown v. Kesley*, 2 B. & P. 518. *Tapley v. Martens*, 8 T. R. 451. *Bodenham v. Purchas*, 2 B. & A. 39. *Supra*, 306. [1089, note (1).]

(z) *Israel v. Benjamin*, 3 Camp. 40. Tidd's Pr. 645, 7th edit.

(a) 4 T. R. 579. *Cox v. Parry*, 1 T. R. 464. *Elliott v. Callow*, 2 Salk. 597. *Guilod v. Nock*, 1 Esp. C. 347. *Watkins v. Towers*, 2 T. R. 275; and see *Cox v. Brain*, 3 Taunt. 95. It admits the right to sue in the particular capacity (*Tuson v. Batting*, 3 Esp. C. 192), and supersedes the usual proofs in the case of a bill of exchange, *Gutteridge v. Smith*, 2 H. Bl. 274. *Jenkins v. Tucker*, 1 H. B. 90. *Bennett v. Francis*, 2 B. & P. 550. 2 Camp. 357. *Dyer v. Ashton*, 1 B. & C. 3. Payment of money into court, upon a covenant, admits the deed. *Randall v. Lynch*, 2 Camp. 357.

States, and does not amount to an application of the payments to the first bond. *United States v. January & al.* 7 Cranch, 572. The general rule as to the application of different payments does not hold where the receiver is a public officer not interested in the event of the suit, and who receives on account of the U. States, where the payments are indiscriminately made, and where different sureties, under distinct obligations, are interested. *ibid.*]

Thus a general payment admits the policy of insurance, alleged in a special count, and precludes the defendant from proving by evidence that the policy has been vacated by a material alteration (b). And in an action by a farmer of tithes under the statute, the payment admits the title, and reduces the question to the *quantum* of damages (c).

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IV.

Of money into
court.
Effect of.

The admission by paying money into Court will support the contract stated upon the declaration, although it appear upon the evidence, that if the admission had not been made the plaintiff must have been non-suited (d); as where in an action of *assumpsit* for negligence in the carriage of goods, it appeared that according to the terms of the contract actually made, the plaintiff was not entitled to recover at all (e).

* It has even been held that such payment amounts to an admission of a contract for goods sold and delivered, with respect to goods of the plaintiff tortiously converted by the defendant to his own use (f). * 1095

Admission, by
paying money
into court.

But in an action against a justice of the peace for an action done in his official capacity, the bringing money into Court by virtue of a statute, does not, it is said, admit the right of action (g).

Such payment operates merely as evidence of the defendant's admission of the contract, upon which a jury may

(b) *Andrews v. Palsgrave*, 9 East, 325; & *supra*, note (a).

(c) *Broadhurst v. Baldwin*, 4 Price, 58; and see *Cox v. Parry*, 1 T. R. 464.

(d) *Yate v. Willan*, 2 East, 128. *Figgott v. Dunn*, *ibid*. Where goods had been sold by sample at a stipulated price, and the defendant, in an action of *indebitatus assumpsit* for goods sold and delivered, paid money into court, it was held at *Nisi Prius* that he could not afterwards insist upon the inferiority of the goods, and that he ought to have returned them. *Leggett v. Cooper*, 2 Starke's C. 103; *sed qu*.

(e) *Yate v. Willan*, 2 East, 128; *infra*, 1096, note (l). In a subsequent case the court held that this case could not be supported to the full extent, and that the defendant might still avail himself of a stipulation by which the amount of damages was limited. When it appears that there is a material variance between the contract declared upon, and the real contract, the plaintiff, it seems, cannot recover; for, although the defendant admits the contract stated, yet the plaintiff must show damages from the breach of that contract, which he cannot do where the damage has resulted from the breach of another and different contract. See *Mellish v. Allnutt*, 2 M. & S. 106; *infra*, 1097 (q).

(f) *Bennett v. Francis*, 2 B. & P. 550. *Qu.* whether, independently of this consideration, the plaintiff might not waive the *tort*, and recover as for goods sold and delivered. *Vide supra*, 636. 109.

(g) 13 East, 202, 3.

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act, and if they do not in a special verdict expressly find the contract, but merely the fact of the payment of money into Court, it seems that the Court cannot make the inference (h).

Where the plaintiff had misled the defendant, and induced him to prepare to try a question of fraud, the Court would not permit him to insist upon the admission made by the payment of money into Court, so as to exclude the defendant's evidence of fraud (i).

Effect of pay-
ing money into
court, by way
of admission.

* 1096

Such payment merely admits the contract and damages *pro tanto*, and the plaintiff will be nonsuited unless he prove that a greater sum is due (k). And where * a limitation has been annexed to the real contract, the effect of which is, under certain circumstances, to preclude the plaintiff from recovering more than a specified sum, the defendant, although he has paid money into Court generally, may prove the limitation, and show that the plaintiff is not entitled to recover more than has been paid into Court.

In an action against a carrier, on a breach of an *assumpsit* to carry goods safely, 5*l.* having been paid into Court generally, it was held that it was competent to the defendant to prove notice to the plaintiff that no more than 5*l.* would be accounted for, for any goods, unless entered as such, and paid for accordingly (l); for the notice did not alter the contract for safe carriage, but merely limited the amount of damages for breach of that contract.

In an action on a valued policy, the payment of money into Court upon a count which states a total loss by capture, does not admit a total loss, and the plaintiff is bound to prove a damage exceeding the sum so paid in (m). And where the declaration was for the price of bark sold to the defendant, to be paid for at the average price, as ascertain-

(h) *Mellish v. Allnutt*, 2 M. & S. 106.

(i) *Muller v. Hartshorn*, 3 B. & P. 556. The declaration contained a special count on a policy of insurance, and the money counts and money had been paid into court generally.

(k) 3 T. R. 657. 2 Salk. 597. 4 T. R. 10. 7 T. R. 372. 2 H. B. 374. *Rucker v. Palsgrave*, 1 Taunt. 419; *infra*, note (m).

(l) *Clarke v. Gray*, 6 East, 564. In the previous case of *Yate v. Willan* (2 East, 128), it was held, that in such an action, and payment of money into court, it was sufficient for the plaintiff to produce the rule, and prove the value of the goods, to entitle him to recover to the full amount; and that the defendant could not avail himself of a notice that he would not be responsible for more than 5*l.* unless, &c. But in the latter case of *Clarke v. Gray*, the court intimated that the former case could not be supported to the full extent. See also *Cox v. Parry*, 1 T. R. 464.

(m) *Rucker v. Palsgrave*, 1 Taunt. 419. 1 Camp. 557.

ed on a day specified, it was held that the payment of money into Court did not admit the average price to be as stated in the declaration (*n*).

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* Such payment into Court does not preclude the defendant from objecting to the illegality of the contract, in order to bar the plaintiff from recovering more than has been paid into Court (*o*). Neither is the defendant precluded from insisting that the loss complained of did not result from the breach of the particular contract (*p*). * 1097

Effect of paying money into court.

Thus, where money is paid into Court generally, on a declaration containing a special count on a policy, the defendant may dispute his further liability with respect to goods, which were not loaded according to the terms of the policy (*q*).

Where the payment into Court is applicable indifferently to several grounds of claim alleged by the plaintiff, the plaintiff cannot apply the admission resulting from the payment of money into Court generally, so as to make it evidence of any one particular ground of claim.

The plaintiff, on a declaration on a policy on fish, free from average, unless general, or the ship be stranded, averred that the ship was stranded, bulged, damaged and wrecked, and it was held that this was not evidence of a total loss, and of a stranding, for the loss, consistently with the declaration, might have arisen from other means than by stranding (*r*).

If money be paid into Court generally, and the plaintiff insists upon several claims, some of which are illegal, and others legal, the Court will apply the payment to the legal demand (*s*). And where money cannot be paid into Court upon some of the counts, * the payment will be applied to those upon which it might legally be made (*t*). * 1098

Where the defendant has taken out a rule for the payment of money into Court, but has not paid the taxed costs to the plaintiff, and the plaintiff proceeds in the action in order to recover the costs, it is sufficient for him to produce the rule of Court and the master's *allocatur*, and this will entitle him to a verdict for nominal damages (*u*), unless

(*n*) *Stoveld v. Brewin*, 2 B. & A. 116.

(*o*) *Cox v. Parry*, 1 T. R. 464.

(*p*) 2 M. & S. 106.

(*q*) *Mellish v. Allnutt*, 2 M. & S. 106.

(*r*) *Everth v. Bell*, 7 Taunt. 450. 1 Moore, 158.

(*s*) *Ribbans v. Crickett*, 1 B. & P. 264.

(*t*) *Cotterell v. Apsey*, 6 Taunt. 322. 1 Marsh. 581.

(*u*) *Horsburgh v. Orme*, 1 Camp. 558, *n*.

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ing money
into court.

the defendant prove that he has paid the costs under the rule, pursuant to the master's *allocatur*. And it is not necessary in such case for the plaintiff to prove a previous demand of costs, where they have been taxed, but the defendant has omitted to pay them (x).

Unless the plaintiff proves his claim to a larger sum than that which has been paid into Court, he is liable upon the production of the rule to be nonsuited (y). But if the plaintiff, after taking the money out of Court, take a verdict for the whole sum, without deducting the sum paid into Court, the Court will set it aside, although no evidence be given of the rule (z). It has been doubted whether the production of the rule by the defendant is to be considered as evidence given by him, so as to entitle the plaintiff's counsel to a reply, but by a rule of the court of Common Pleas it is not to be so considered (a).

Of taking
money out of
court.

* 1099

By the de-
fendant.

The act of taking money out of Court, and accepting it with costs in satisfaction, will not operate as * conclusive evidence in a collateral action, to show that nothing more was due.

In an action on the statute, for selling five chaldrons of coals, and delivering them short by sixteen bushels, the plaintiff proved, that in an action by the present defendant for the price of the five chaldrons, the plaintiff, then defendant, paid the amount into Court, minus the value of the sixteen bushels, and that the then plaintiff took the money out, and had his costs; and this the plaintiff contended was conclusive to show the deficiency. But *Ld. Ellenborough* held that as the act of the attorney in taking the money was equivocal, he would admit evidence for the purpose of explaining the intention (b).

Money which has been paid into Court cannot be recovered back, though it was paid wrongfully, for it is acknowledged on the record to be due (c).

(x) *Smith v. Smith*, 2 N. R. 473. *Smith v. Battersby*, 7 Price, 674.

(y) By the terms of the rule. See 3 T. R. 657. 2 Salk. 597. 4 T. R. 10. 7 T. R. 372. 2 H. B. 374.

(z) 2 Taunt. 267.

(a) *Ibid*.

(b) *Hildyard v. Blowers*, 5 Esp. C. 69, Cor. Lord Ellenborough; the defendant had a verdict.

(c) *Malcolm v. Fullarton*, 2 T. R. 645. And the Court will not order money paid in through mistake to be restored, unless it appear that some fraud or deceit has been practised upon the defendant, 2 B. & P. 392.

PEDIGREE.

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In proving *A.* to be the heir at law of *B.*, in strict and formal detail (*d*), it is necessary to prove, 1st, their relationship through their common ancestor, and 2dly, negative proof is requisite that no other descendant from the common ancestor impedes the descent to *A.* (*e*).

* 1st. In order to prove the relationship, of *A.* and *E.*, * 1100 supposing *C.* to be the common ancestor, and *D.* and *E.* to be his son and grandson, in the one line, and *B.* and *A.* to be his son and grandson in the other, the direct course would be to prove the marriage of *C.* and his wife, and that *B.* and *D.* were his legitimate children (*f*); and also the marriages of *B.* and *D.*, and that *A.* and *E.* were respectively the issue of those marriages (*g*). Proof of relationship.

2dly. By proof of the deaths of *E.* and *B.* (*h*), and also, that *B.*, *C.*, *D.* and *E.* had no issue, which according to the well-known rules which regulate descents, would take in preference to *A.*, or if they had, then to show the failure of such issue by negative evidence, or to prove that the issue, if any exists, which would otherwise take in preference to *A.*, is of the half-blood, &c.

As in matters of pedigree it is impossible to prove the relationships of past generations, by living witnesses, resort must usually be had to *traditionary declarations* made by those now dead, who were likely to *know* the fact, and to declare the truth; or to evidence of *general reputation*. Presumptive evidence.

Proof of the cohabitation of parties who publicly acknowledged each other in the characters of husband and wife, their treating and educating children as their legitimate offspring, according to their rank and station in life, and their acknowledging them to be such in the face

(*d*) As to presumptive evidence, *vide infra*, 1100.

(*e*) The person who claims as heir at law to the person last seized must prove not only his relationship, but the failure of issue from the persons who intervene in the course of descent, by negative evidence (*Richards v. Richards*, B. R. E. 4 Geo. II. Ford's MSS.) Where the plaintiff claimed as heir by descent, and proved the death of his elder brothers, but did not prove that they died without issue, it was held to be insufficient; but reputation of the negative, where such brothers had been absent from the family, would have been sufficient. *Doe v. Griffin*, 15 East, 293. See *infra*, 1102.

(*f*) By direct proof, or by copies from the registers, with evidence of identity, or by reputation where direct proof, &c. cannot be had.

(*g*) By the testimony of members of the family, or of those conversant with it, or by reputation. See *infra*, 1102.

(*h*) *Supra*, 457, 8; & *infra*, 1120.

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* 1101
Proof by
declarations
&c.

of the world :—Or, on the other hand, the representation and treatment of a child as illegitimate, are all of them solemn and deliberate admissions relating * to facts necessarily within the knowledge of the parties making them, accompanying and corresponding with their acts and conduct. Such representations are therefore admissible in evidence, on the broad and general elementary principle already adverted to (i).

They are not to be considered as mere wanton assertions, upon which no reliance can be placed; on the contrary, in the absence of any motive for committing a fraud upon society, it is in the highest degree improbable that the parties should have been guilty of practising a continued system of imposition upon the rest of the world, involving a conspiracy in its nature very difficult to be executed. So far, upon the strictest principles, the evidence is receivable, but the necessity of the case warrants a far greater latitude.

All those who knew the actual state of the family at a remote period may now be deceased, and very possibly no means of proof remain, except such as are derived from traditionary declarations of members of the family, or persons connected with it, now deceased, or from general reputation (1). The great difficulty of proving remote facts of this nature renders it necessary that the Courts should relax from the strictness which is required in the proof of modern facts, in the ordinary manner, by living witnesses (k).

Hence, the traditionary declarations of deceased members of the family are in general admissible as evidence, after the deaths of those persons, as to the degrees of relationship of the different branches of the family, their intermarriages, the number of their children, and the times of their respective births (l).

* 1102 * Such declarations, made by persons who must have known the facts, and who laboured under no temptation to

(i) *Supra*, Vol. I. p. 47. & tit. *Marriage*.

(k) See the observations of Le Blanc, J. in *Higham v. Ridgway*, 10 East, 120. [*Strickland's Lessee v. Poole*, 1 Dallas, 14. *Clairborne v. Parish*, 2 Wash. 146. *Jenkins v. Tom & al.*, 1 Wash. 123.]

(l) See *Higham v. Ridgway*, 10 East, 120; the case of the *Berkeley Peerage*, 4 Camp. 401; and the Lord Chancellor's judgment in the case of *Vowles v. Young*, 13 Ves. 143.

(1) [Hearsay is evidence in case of pedigree only where the fact sought to be established is ancient, and no better evidence can be obtained. *Briney v. Hann*, 3 Marsh. 326.] •

deceive, carry with them such a presumption of truth, as, coupled with the great difficulty of procuring more certain evidence, sanctions their reception.

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To warrant the admission of declarations relating to pedigree, it is essential, 1st, that the parties who made the declaration be proved to be dead at the time of the trial, otherwise it is not the *best* evidence (*m*). 2ndly, That the declarants were likely to know the facts. The tradition must therefore be derived from persons so connected with the family, that it is natural and likely, from their domestic habits and connexions, that they are speaking the truth, and that they could not be mistaken. *Ld. Eldon* observed (*n*), that declarations in a family, descriptions in wills, inscriptions upon monuments, in bibles and registry-books, are all admitted upon the principle that they are the natural effusions of a party who *must know the truth*, and who speaks upon an occasion when the mind stands in an even position, without any temptation to exceed or fall short of the truth.

Connexion of
the declarant
with the
family.

Proof by one of the family that a member of it went abroad many years ago, and was supposed to have died there, and that the witness never heard in the family that he had ever been married, was held in a late case to be good evidence of the death of that person (*o*).

* Declarations by the deceased husband as to the legitimacy of the wife, are admissible after his death; for although he was not connected by blood, yet it is probable that he would be well acquainted with the fact, and possess better means of information than a remote relation would (*p*). * 1103

(*m*) *Supra*, Part I. p. 62. *Pendrell v. Pendrell*, 2 Str. 925. B. N. P. 113. 1 M. & S. 689. *Doe v. Ridgway*, 4 B. & A. 53; *supra*, 463.

(*n*) *Whitelocke v. Baker*, 13 Ves. 514.

(*o*) *Doe v. Griffin*, 15 East, 293. Proof by an elderly person that a particular individual went abroad to the West Indies many years ago, when he was a young man, and that, according to the repute of the family, he had afterwards died in the West Indies, and that the witness had never heard in the family of his having been married, is *prima facie* evidence that that person died without issue (*ibid.* and see *Doe d. George v. Jesson*, 6 East, 80). Proof that the husband went abroad, and had not been heard of seven years, was held to be sufficient evidence to entitle the widow to her dower (3 Bac. Ab. 369, 6th edit.). So evidence, that a tenant for life of premises, born in 1759, had absented himself from his relations ever since 1804, given by a person who resided near the spot, but who was not a member of the family, was held to be good evidence to show that the tenant for life was dead in the year 1818, although no member of the family was called as a witness. *Doe d. Lloyd v. Deakin*, 4 B. & A. 433.

(*p*) *Vowles v. Young*, 13 Ves. jun. 143.

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So it seems that although the declarations of mere strangers be not evidence as to pedigree (*q*), yet that the declarations of those who lived in intimacy with them, and who consequently possessed the means of judging, although not relations, are admissible (*r*) (1).

* 1104
Evidence of
declarations.
Absence of
suspicion.

3rdly, The very foundation on which such declarations * are admissible fails where it is probable that the parties who made the declarations laboured under any temptation to misrepresent the facts (*s*); when that is the case, such evidence is inadmissible. Although the practice on the subject has not been uniform (*t*), it seems to be now set-

(*q*) 3 T. R. 723.

(*r*) 3 T. R. 723. See the observations of Buller, J. *ibid.*; where he says, "I admit that the declarations of members of a family, and perhaps of others living in intimacy with them, are received in evidence as to pedigrees." And see B. N. P. 295; where, in the case of the *Duke of Athol v. Lord Ashburnham*, Mr. Worthington's declarations were admitted in evidence. In *Weeks v. Sparke*, (1 M. & S. 679), Le Blanc, J. says, "In questions of pedigree, the evidence of what persons connected with the family have been heard to say is received as to the state of the family." And see *Higham v. Ridgway*, 10 East, 120, & *supra*, Vol. I. p. 318. See also Lord Kenyon's observations in *R. v. Eriswell*, 3 T. R. 723. *Doe d. Lloyd v. Deakin*, 4 B. & A. 433; *supra*, note (*o*). But see Phillips on Ev. 246.

(*s*) *Supra*, Part I. s. xliii. Ld. Eldon's observations, *supra*, 1102.

(*t*) In the case of *Goodright v. Moss* (Cowp. 591), the court held that an answer in chancery, by the mother of the lessor of the plaintiff, to a bill filed by the committee of a lunatic, the person last seized, against the lessor of the plaintiff, and his mother, in which she stated the lessor of the plaintiff to be illegitimate, was evidence against the plaintiff; but this appears to have been so decided on the general principles relating to the admissibility of declarations in cases of pedigree; and the particular objection, as to the time of making the declaration, does not appear to have been urged. It is also to be observed, that it was unnecessary to decide upon this point, the defendant being clearly entitled to a new trial, on the ground that other evidence, *viz.* of declarations made by the father, had also been rejected, which clearly were admissible; such evidence, however, appears to have been received by Lord Camden, in the case of *Hayward v. Firmion*, Sitt. after Trin. T. 1766, cited by Lawrence, J. in the case of the *Berkeley Peerage*; and see

(1). [Where the witnesses are not connected with the family, have no personal knowledge of the facts of which they speak, and have not derived their information from persons connected or particularly acquainted with the family, but speak generally of what they have heard and understood, such evidence is insufficient to prove pedigree. *Jackson v. Browner*, 18 Johns. 37. See *Post*, 1119, note (1).]

tled by the cases of the Banbury Peerage (u), and Berkeley Peerage (x), * that a declaration as to pedigree, if

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Nicholls v. Parker, 14 East, 331, in note. On the other hand, Reynolds, C. B. in a case cited Vin. Abr. Ev. I. b. 21, as tried Dev. Spring Ass. 1731, rejected such evidence arising subsequently to the controversy. * 1105

(u) *Supra*, Vol. I. p. 287.

(x) In the case of the *Berkeley Peerage*, before a committee of privileges of the House of Lords (4 Camp. 401), in order to prove the legitimacy of the claimant of the peerage (which depended upon the validity of a marriage alleged to have been contracted by his parents in the year 1786), the claimant, who was born subsequently to that marriage, but previous to a marriage contracted between the parties in 1796, had in the year 1799, conjointly with two brothers, born also after the first, but previous to the second marriage, filed a bill in chancery to perpetuate the evidence of their legitimacy, on the ground that they were entitled in remainder in tail to certain lands then held by the father for life. The children born after the second marriage were defendants, along with others entitled in remainder after them.

The Earl of Berkeley was one of the witnesses examined on interrogatories for the plaintiffs, and in his deposition swore positively to the plaintiff's legitimacy, and the validity of the first marriage. The counsel for the claimant proposed to read this deposition before the committee as a declaration in a matter of pedigree.

The admissibility of this evidence being objected to, the following questions were submitted to the judges by the House of Lords.

1st. Upon the trial of an ejectment respecting Black Acre, between A. and B., in which it was necessary for A. to prove that he was the legitimate son of J. S., A. after proving, by other evidence, that J. S. was his reputed father, offered to give in evidence a deposition made by J. S. in a cause in chancery, instituted by A. against C. D., in order to perpetuate testimony to the alleged fact disputed by C. D. that he was the legitimate son of J. S., in which character he claimed an estate in White Acre, which was also claimed in remainder by C. D. B. the defendant in the ejectment, did not claim Black Acre under either A. or C. D., plaintiff and defendant in the chancery suit.

According to law, could the deposition of J. S. be received, upon the trial of such ejectment, against B. as evidence of declarations of J. S., the alleged father, in matters of pedigree?

2ndly. Upon the trial of an ejectment respecting Long Acre between E. & F., in which it was necessary for E. to prove that he was the legitimate son of W., the said W. being at that time dead, E. after proving by other evidence that W. was his father, offered to give in evidence an entry in a Bible, in which Bible W. had made such entry in his own hand-writing, that E. was his eldest son born in lawful wedlock from G., the wife of W., on the 1st day of May 1778, and signed by W. himself.

Could such entry in such Bible be received to prove that E. is the legitimate son of W., as evidence of the declaration of W. in matter of pedigree?

3rdly. Upon the trial of an ejectment respecting Little Acre between N. and F., in which it was necessary for N. to prove that he

PART IV. made *post litem motam*, that is after the commencement, not merely * of the litigation but of the controversy, is not admissible (1).

* 1106

was the legitimate son of *T.*, the said *T.* being at that time dead, *N.* after proving by other evidence that *T.* was his reputed father, offered to give in evidence an entry in a Bible, in which Bible *T.* had made such entry in his own hand-writing, that *N.* was his son born in lawful wedlock, from *J.*, the wife of *T.*, on the first day of May 1778, and signed by *T.* himself; and it was proved in evidence on the said trial, that *T.* had declared "that he *T.* had made such entry for the express purpose of establishing the legitimacy, and the time of the birth of his eldest son *N.*, in case the same should be called in question in any case or in any cause whatsoever, by any person after the death of him, the said *T.*"

Could such entry in such Bible be received, to prove that *N.* is the legitimate son of *T.*, as evidence of the declaration of *T.* in matters of pedigree?

There being a difference of opinion upon the first question, the judges delivered their opinions *seriatim*.

Bayley, J. held that the deposition was inadmissible, because it was made *post litem motam*, after a controversy raised upon this very point; because *J. S.* the witness who made it, was brought forward to speak to the point, by a person who had a direct interest in establishing it; because the deposition is upon interrogatories formerly put to *J. S.* by an interested party; and because *B.*, against whom it is proposed that the deposition should be read, had no opportunity of putting any questions on his own behalf. In general, when evidence is given *viva voce* in courts of justice, the witnesses speak to what they know, and each party has, in turn, an opportunity of putting such questions as he may think fit for the purpose of drawing forth the whole truth, and of throwing every light upon the subject which the witness is capable of giving. Whoever has attended to the examination, the cross-examination, and the re-examination of witnesses, and has observed what a very different shape their story appears to take in each of these stages, will at once see how extremely dangerous it is to act on the *ex parte* statement of any witness, and still more of a witness brought forward under the influence of a party interested.

Wood, B.—The admission of hearsay evidence of the declarations of deceased persons in matters of pedigree, is an exception to the general law of evidence, and it has ever been received with a degree of jealousy, because the opposite party has had no opportunity of cross-examining the persons by whom the declarations are supposed to be made; but declarations to be receivable in evidence, as I have always understood, and as was said in the case of *White-locke v. Baker*, must have been the natural effusions of the mind of the party making them, and must have been on an occasion when his mind stood in an even position, without any temptation to exceed or fall short of the truth. Upon this principle it has been the general rule, as far as my experience and knowledge go, to reject hearsay evidence of the declarations of deceased persons, not only

(1) [In *Roudereau v. Montgomery*, (Circuit Court of U. S. Nov. 1821) it was said that this rule of *post litem motam*, in respect to declarations in relation to pedigree, has not been recognized in the United States. Wharton's Digest, 247.]

* It is not necessary, in order to the exclusion of the evidence, to show that the *lis mota* was known to the

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relative to matters of actual suit, but in dispute and controversy prior to the commencement of judicial proceedings.

Graham, B.—I have the misfortune to differ upon this question, not only with the two learned persons who have preceded, but, I am afraid, with the rest of my brethren who are to follow me; but the opinion I am about to offer is the conclusion to which my mind has come with perfect satisfaction. Under the circumstances of the case, I think there is no legal objection to receiving this deposition in evidence, not as a deposition—that I am not prepared to say, but as a declaration of the deponent. One ground on which I am induced to doubt the soundness of that rule which has been laid down by my learned brothers is, that I cannot find it stated in any book of law that ever fell within my reading. If there be a rule that the declaration of a deceased person upon a subject on which evidence of reputation may generally be received, is inadmissible when made subsequent to suit commenced, it is a rule with which, in my little experience, I have not become acquainted, and which is confined to the breasts of a few peculiarly conversant with the business of *Nisi Prius*. I must likewise observe that great uncertainty will arise in the application of the rule. We are told that it extends to all declarations after a suit is in contemplation. But how is it to be determined whether the parties did or did not contemplate a suit at any given moment of time? Then, if it should be clearly shown that the party making the declarations could not, by possibility, know that a suit was commenced or contemplated, surely the declarations are receivable; but if you exclude them when his knowledge of the *lis mota* is made to appear, what a field of inquiry is opened as often as evidence of reputation is tendered to a judge and jury! It seldom happens that an investigation of a pedigree takes place till an action is brought or resolved upon, and it will often be a great hardship to reject what was then said by a member of the family who dies before the trial. Suppose a man is privately married before the English ambassador at Paris, where no register is kept, and has a son; on his return to this country he is re-married, to satisfy the scruples of his wife, and afterwards has another son. In the progress of twenty or thirty years, when all the witnesses to the marriage, except the father, are dead, an estate is left to the eldest legitimate son, who enters into possession. The youngest son brings an ejectment to recover this. The father hears of such a proceeding with surprise and dismay, makes a solemn declaration of the legitimacy of the eldest son, and dies. I should require strong authority, and clear principle, for the rule which should exclude his dying declaration at the trial of the ejectment. You may have the natural and voluntary effusions of the mind of the individual after a suit is commenced, although what he then says may be subject to more suspicion.

Lawrence, J.—I concur with the judges who have stated their opinions against the admissibility of the evidence. From the necessity of the thing, the declarations of members of the family, in matters of pedigree, are generally admitted; but the administration of justice would be perverted if such declarations could be admitted which have not a presumption in their favour that they are consistent with truth. Where the relator had no interest to serve.

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* person who made the declaration. After the controversy has originated, all declarations are to be

and there is no ground for supposing that his mind stood otherwise than even upon the subject, (which may be fairly inferred before any dispute upon it has arisen,) we may reasonably suppose that he neither stops short nor goes beyond the limit of truth in his spontaneous declarations respecting his relations and the state of his family. The receiving of these declarations, therefore, though made without the sanction of an oath, and without any opportunity of cross-examination, may not be attended with such mischief as the rejection of such evidence, which, in matters of pedigree, would often be the rejection of all the evidence that could be offered. But mischievous indeed would be the consequence of receiving an *ex parte* statement of a deceased witness, although upon oath, procured by the party who would take advantage of it, and delivered under that bias which may naturally operate on the mind in the course of a controversy upon the subject. Notwithstanding what is said in *Goodright v. Moss*, I cannot think that Lord Mansfield would have held that declarations in matters of pedigree, made after the controversy had arisen, ought to be submitted to the jury. They stand precisely on the same footing as declarations on questions of rights of way, rights of common, and other matters depending upon usage; and although I cannot call to mind the ruling of any particular judge upon the subject, yet I know that, according to my experience of the practice (an experience of nearly forty years), wherever a witness has admitted that what he was going to state he had heard after the beginning of a controversy, his testimony has been uniformly rejected. If the danger of fabrication and falsehood be a reason for rejecting such evidence in cases of prescription, that will equally apply in cases of pedigree, where the stake is generally of much greater value. In looking for authorities upon the subject, I have found two cases of *Nisi Prius*, *Spadwell v. —*, before Lord C. Baron Reynolds, at the Spring Assizes at Exeter in 1730, and *Hayward v. Firmin*, before Lord Camden, at the Sitings after Trin. Term 1766. In the first of these, the declarations of an aunt, as to which of three brothers came first into the world, made after the dispute had arisen, were rejected; but such as she had made prior to the dispute were received. Therefore, in that case, the learned Judge took the distinction of before and after litigation commenced. *Hayward v. Firmin* was an issue to try the legitimacy of a child, and the declarations of the mother as to that fact were received in evidence, though made after the commencement of the suit. But it appears that the case determined by Lord C. Baron Reynolds, was not at that time brought under the consideration of Lord Camden. In *Goodright v. Moss*, the point, whether declarations could be received which were made while the dispute was existing, was not adverted to; and in considering the authority of that decision, it must not be forgotten that Mr. Baron Eyre, who tried the cause, was of opinion that the answer was not admissible evidence. The authorities being thus balanced, I think the point must be considered as without any decision; and we must resort to principle, and the uniform practice which has obtained in matters of prescription. Hardships may arise in rejecting declarations made between the commencement of the suit and the time of the trial; but such hardships are not confined to the case of

* excluded, without regard to the knowledge of the witness; for if an inquiry were in each case to be

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pedigree. In other cases, if witnesses die before the trial of the cause, the party who relied upon their testimony must sustain the loss. For avoiding uncertainty in judicial proceedings, general rules must be laid down and adhered to, without regard to our feelings or our wishes on particular occasions. Besides, the hardship may generally be avoided by a bill to perpetuate testimony. In the supposed case of a marriage at Paris no difficulty need have arisen; for under a bill to perpetuate testimony the father might have been examined on behalf of the eldest son, and his deposition as to all the circumstances of the first marriage regularly read, against the younger son, on the trial of the ejectment. Although the exclusion of declarations made in the course of the controversy may prejudice some individuals, it is better to submit to this inconvenience than expose courts of justice to the frauds which would be practised upon them, were a contrary rule to prevail. That this is not an imaginary apprehension, will occur from what happened at the bar of your Lordships house in the *Douglas* and *Anglesea* causes; in the first of which, fabricated letters were given in evidence before your Lordships, and in the second, false declarations. Notwithstanding the danger of incurring the penalties of the crime of perjury, there is scarcely an assize or sittings in which witnesses are not produced who swear in direct contradiction the one to the other; and it may be feared that persons who have so little regard to truth may be induced to make false declarations, when they run no risk of punishment in this world, as no use can be made of their evidence till their death. We know that passion, prejudice, party, or even good-will, tempt many who preserve a fair character with the world, to deviate from the truth in the laxity of conversation. Can it be presumed that a man stands perfectly indifferent upon an existing dispute respecting his kindred? His declarations *post litem motam*, not merely upon the commencement of the law-suit, but after the dispute has arisen (that is the primary meaning of the word *lis*), are evidently more likely to mislead the jury than to direct them to a right conclusion, and therefore ought not to be received in evidence.

Heath, J. and Macdonald, C. B. agreed with the majority.

Mansfield, C. J. after observing upon the latitude allowed by the practice of Scotland in the reception of hearsay evidence, observed, "But in England, where the jury are the sole judges of the fact, hearsay evidence is properly excluded, because no man can tell what effect it might have upon their minds. To the general rule with us there are two exceptions; first, on the trial of rights of common, and other rights claimed by prescription; and secondly, on questions of pedigree. With respect to all these, the declarations of deceased persons who are supposed to have had a personal knowledge of the facts, and to have stood quite disinterested, are received in evidence. In cases of general rights which depend upon immemorial usage, living witnesses can only speak of their own knowledge to what has passed in their own time, and to supply the deficiency, the law receives the declarations of persons who are dead; there, however, the witness is only allowed to speak to what he has heard the dead man say respecting the reputation of the right of way, or of common, or the like: a declaration with regard to a par-

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* instituted, whether the existence of the controversy was or was not known at the time of the declaration,

tioular fact which would support or negative the right, is inadmissible. In matters of pedigree, it being impossible to prove by living witnesses the relationships of past generations, the declarations of deceased members of the family are admitted; but here, as the reputation must proceed on particular facts, such as marriages, births, and the like, from the necessity of the thing, the hearsay of the family as to these particular facts is not excluded. General rights are naturally talked of in the neighbourhood, and family transactions among the relations of the parties; therefore what is thus dropped in conversation upon such subjects, may be presumed to be true. But after a dispute has arisen, the presumption in favour of declarations fails; and to admit them would lead to the most dangerous consequences. Accordingly, I know no rule better established in practice than this, that such declarations shall be excluded. With respect to questions of prescription, I have known many instances in which the rule has been acted upon; I never heard the contrary contended, either by counsel or judge. I think the rule is equally applicable to questions of pedigree, and the violation of it here would be still more alarming. There is no difference between the declarations of a father and those of any other relative; and if the declarations of a father, after the suit has begun, be received, so must the declarations of all related to the parties, whatever their station in society, and whatever their private character. I do not feel that much mischief is likely to arise from such declarations being rejected.

"I have now only to notice the observation, that to exclude declarations you must show that the *lis mota* was known to the person who made them. There is no such rule. The line of distinction is the origin of the controversy, and not the commencement of the suit; after the controversy has originated all declarations are to be excluded, whether it was or was not known to the witness. If an inquiry were to be instituted in each instance, whether the existence of the controversy was or was not known at the time of the declaration, much time would be wasted, and great confusion would be produced. For these reasons I conceive that the deposition now offered in evidence is not admissible."

Lord Eldon, C. after referring to the case of the *Banbury Peerage*, said, "Upon the admissibility of such evidence, Judges have held different opinions; and it might appear remarkable that a declaration under no sanction was receivable, and a declaration upon oath was not. I therefore thought it material to ascertain from the highest authority what the law is upon the subject. Accordingly, in the *Banbury* case, as the depositions under the bill to perpetuate testimony contained many statements with regard to pedigree, a question was put to the Judges, whether, if they could not be received as depositions, they could be received as declarations. The Judges thought that, at all events, the depositions could not be received as declarations, unless the individuals whose declarations were supposed to be incorporated in the depositions were *aliunde* proved to be relations, and that there was no such evidence. I therefore thought it right that the question should be again put to the Judges in the present case, it being of great importance to the claimant, and to the public. Your Lordships have heard the opi-

* much time would be wasted, and great confusion would be produced (y).

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nion which the learned Judges have delivered, and I have no difficulty in saying that I agree with that of the majority. In the case alluded to, decided in the court of Chancery by myself (on which I ought to place less reliance than any other noble Lord), conscious of my liability to err, and prone to doubt (an infirmity which I cannot help), I delivered the sentiments which I believed to be according to law. I have heard nothing since which has convinced me I was wrong. I have attended most anxiously to the distinctions taken by Mr. Baron Graham; but on revolving the subject in my mind, I am forced to concur with the opinion so forcibly expressed by Mr. Justice Lawrence, that if the writing was not evidence as a deposition, it was not evidence at all. The suit in equity is commenced on the ground that, unless the testimony be so perpetuated that it may be used as a deposition, it must be entirely lost. Being embodied in a deposition, are you to say that this same testimony is to be received as declaration, and read in evidence from the deposition? The previous existence of the dispute would be a sufficient ground to proceed upon. I have known no instance in which declarations *post litem motam* have been received. When it was proposed to read this deposition as a declaration, the Attorney General flatly objected to it; he spoke quite right, as a western circuiter, of what he had often heard laid down in the west, and never heard doubted. Lord Thurlow was most studious to contradict the case of *Goodright v. Moss*, and he had learned his doctrine in the same school; so had the Chief Justice of the Common Pleas, and I believe Mr. Justice Heath, the result of whose experience your Lordships have just heard. Therefore, although the authorities are at variance, principle and practice unite in rejecting the evidence. I introduced the Bible into the second and third questions, as the book in which such entries are usually made. If the entry be the ordinary act of a man in the ordinary course of life, without interest or particular motive, this, as the spontaneous effusion of his own mind, may be looked at without suspicion, and received without objection. Such is the contemporaneous entry in a family Bible, by a father of the birth of a child."

On the second and third question, *Mansfield, C. J.* delivered the unanimous opinion of the Judges.—Referring to the second, he said, "I cannot answer this question without adding something to the answer beyond what is in the question, because it supposes that an entry written by a father in a Bible would be of more weight than the same written in any other book. Now I know no difference between a father writing any thing respecting his son in a Bible, and his writing it in any other book, or on any other piece of paper, and therefore the answer I would give is, that such a writing by a father in a Bible, or in any other book, or upon any other piece of paper, would be a declaration of that father in the understanding of the law, and like other declarations of the father, might be admitted in evidence. Were it to appear in your Lordships Journals that the answer was given in the very words of the question, some persons might suppose that the admissibility of the entry depended upon its

(y) Case of the *Berkeley Peerage*, 4 Camp. 401; and Sir James Mansfield's observations, *ibid.* 417.

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* 1113
* 1114
Declarations,
to what facts
limited.

* There is a material difference between traditional declarations in matters of pedigree, and those which * relate to ancient rights, dependent on usage; in the latter case, the admissibility is confined to general * declarations and reputation concerning the right, such as right of common, right of usage, or the like (z); and it does not extend to declarations concerning particular facts, from which the right may be inferred, for those are not likely to be made matter of public notoriety and discussion, as general rights are. But in the case of pedigree it is otherwise, and particular declarations as to marriages, births, deaths, &c. are receivable, because from the nature of the case those are facts which are within the peculiar knowledge of the members of the family, and of those who are intimately connected with them (a).

The extent to which such declarations are evidence is defined by the reasons which warrant its admissibility; the principles apply generally to declarations concerning the state of the family, the members of which it consisted, the degrees in which they stand related, their births, marriages and deaths, their ages (1), seniority, and their legitimacy (b). Thus, the declaration or entry of a father

its being written in a Bible, and therefore I submit that the answer should be, 'that such a writing in a Bible, or any other book, or on any other paper, would be admissible in evidence, as a declaration of the father, in matter of a pedigree.'

"The third question is the same in effect, with the addition that the father is proved to have declared that he had made such entry for the express purpose of establishing the legitimacy of his son, and the time of his birth, in case the same should be called in question after the father's death. The opinion of the Judges is, that the entry would be receivable in evidence, notwithstanding the professed view with which it was made. Its particularity would be a strong circumstance of suspicion; but still it would be receivable, whatever the credit might be to which it would be entitled. Of course, I should wish the same addition to be made to this as to the former answer, 'a Bible, or any other book, or any other piece of paper.'"

See also *R. v. Cotton*, 3 Camp. 444; & *supra*, Vol. I. p. 274; and the case 12 Vin. Ab. T. b. 87, cited *infra*, note (d).

(z) *Supra*, Part I. sec. XL.

(a) See the observations of Mansfield, C. J. in the case of the *Berkeley Peerage*. 4 Camp. 417, 18; & *Supra*, 1110.

(b) *Herbert v. Tuckal*, T. Raym. 84, upon a trial at bar; cited *Roe v. Rawlins*, 7 East, 290. See also *Higham v. Ridgway*, 10 East, 109.

(1) [In the case of *Lessee of Albertson v. Robeson*, 1 Dallas, 9, it was held that evidence of hearsay, from the father and mother, is not admissible in a question of age.]

is evidence as to the time when his son was born, or of the fact that he was born previous to the marriage (c).

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Where the question was, which of three sons, all born at a birth, was the eldest, the declaration of a female relation, that she was at the birth, and that she *tied a string round the arm of the second son in order to distinguish him, was admitted as evidence (d). But in the case of *The King v. Erith* (e) it was held that the declaration of the deceased father, as to the place of the son's birth, was not admissible, since it was a simple fact involving only a question of locality; and it was observed by the court that the case did not fall within the principle of, and was not governed by, the rules applicable to cases of pedigree, and was to be proved as other facts are generally proved, according to the ordinary course of the common law.

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limited.
* 1115

Written entries being written declarations, stand upon the same footing with oral ones, as to admissibility. Written entries.

An entry by a father in a bible, or in any other book, stating that *A. B.* was the eldest son born in lawful wedlock, by *M. N.* his wife, at a time specified, is evidence to prove the legitimacy of *A. B.* (f) (1).

(c) *Goodright v. Moss*, Cowp. 591. Case of the *Berkeley Peerage*, 4 Camp. 401.

(d) A man had eight sons; the three last were all born at a birth. Question on ejectment, which was the eldest? They were baptized by the names of Stephanus, Fortunatus, and Achaicus. Declarations of the father were proved that Achaicus was the youngest, and he took these names from St. Paul, in his epistles. The son of Fortunatus was lessor of the plaintiff. *E contra*, it was proved, from the declarations of one *M. F.*, who was a relation, and at the birth, and upon the birth of the second child took a string, and tied it round the arm to know one from the other, &c. Objection was made that the declaration of this woman was not evidence, seeing it was since the death of the fifth son (the said Stephanus and all the other sons dying before him without issue), when there was a discourse about this matter; but what this woman said soon after the birth was allowed in evidence, when there was no prospect of a controversy. Per Reynolds, C. B. at Devon. Lent Assizes, 1731, cited in Vin. Ab. Ev. T. b. 91. This, it seems, is the case cited by Lawrence, *J. supra*, 1109.

(e) *R. v. Erith*, 8 East, 539. [*Shearer v. Clay*, 1 Littell's Rep. 266. acc.]

(f) Case of the *Berkeley Peerage*, 4 Camp. 401. *Supra*, 1105. *Goodright v. Moss*, Cowp. 591. 3 Bl. Comm. c. 7.

(1) [An entry respecting the age of a child, in a book called a family bible, in the hand-writing of the brother of the child, and supported by his oath, that by direction of his deceased father, he

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IV.Written en-
tries and in-
scriptions.

Upon the same principles, a pedigree hung up in a * family mansion, inscriptions on rings used by members of the family, inscriptions upon tomb-stones (*f*), and other matters of the like nature, are admissible to prove a pedigree, for they are all in their nature equivalent to declarations made by the family upon the subject (*g*). A bill in chancery by a father, in which he states his pedigree, is also admissible for the same purpose (*h*) (1).

So it has been held that a paper found with other papers relating to the private concerns of the party last seized of an estate in a drawer, in his house, purporting to be the will of Richard, the grandfather of the person last seized, was evidence to show that the grandfather acknowledged

(*f*) *Baxter v. Foster*, Vin. Ab. Ev. T. b. 87. Sty. 208.

(*g*) Cowp. 591. 12 Vin. Ab. Ev. T. b. 87. 13 Ves. jun. 148. 514. B. N. P. 233. 10 East, 120.

(*h*) *Taylor v. Cole*, 7 T. R. 3, n.—4. c. where there is no controversy as to the pedigree.

copied that and other entries, respecting the ages of the family, from another book in which the original entries were made in his father's hand-writing—without accounting for the non-production of the book in which the original entries were made—is not evidence. *Curtis & al. v. Patton & al.* 6 Serg. & Rawle, 135. *Aliter*, if the original be proved to be destroyed or lost. *ibid.*]

(1) [An *ex parte* affidavit, made abroad, may be admitted to prove pedigree, and the identity of a person so far as respects marriage, but not to establish an independent fact. *Fogler's Lessee v. Simpson*, cited 2 Dallas, 117. 1 Yeates, 17. *Winder v. Little*, 1 Yeates, 152. *Lessee of Lilly v. Kintzmill*, 1 Yeates, 28. But such affidavit, made in another State, is not admissible. *Semb. Douglas's Lessee v. Sanderson*, 2 Dallas, 118. But depositions made by deceased witnesses, whether in or out of the State, in a case between other parties, may be admitted to prove pedigree. *Boudereau v. Montgomery*, Circuit Court, Nov. 1821. Wharton's Digest, 247. The acknowledgment of a deed from persons describing themselves as heirs, taken according to the directions of statute, before the mayor of London, is a circumstance of weight in evidence of pedigree. *Jackson v. Cooley*, 8 Johns. 128. Recitals in a conveyance are evidence of pedigree, Vol. I. p. 369, note (1).

In tracing a pedigree, in a suit for freedom, what a witness swore to, on the executing of a writ of inquiry between the mother of the plaintiff and another person, may be given in evidence to prove the said mother to have been descended from a female Indian ancestor, although the name of that witness be not recollected, nor the witness himself positively known to be dead; it being proved by the witness stating the substance of his testimony, that he was a very old man when he gave his evidence—that he believed him to be dead, and had endeavoured in vain, as counsel for the plaintiff, to find a witness to prove the point to which he had testified. *Pegram v. Isabel*, 2 Hen. & Mun. 193. See *Mima Queen & child v. Hepburn*, 7 Cranch, 290.]

a brother of the name of Thomas to be older than a brother of the name of William (i), although the will was found in a cancelled state, and although there was no evidence that it had ever been acted upon, or that it had ever been proved.

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Written entries and inscriptions.

In the case of *Zouch v. Waters* (k), an old book from Lord Oxford's library, containing the pedigree of William Zouch, of Pilton, and signed by him, was admitted as evidence to show that the plaintiff was not descended from William Zouch, of Pilton.

Public registers of authority are also admissible for the same purpose, being documents made under the authority of law (l). But the entry of the time of a child's birth, although contained in a public register, is not evidence as to the time of the birth, unless it can be proved that the entry was made by the direction of the * father or mother; and then it seems to be receivable as a declaration made by one of them; for a clergyman has no authority to make an entry as to the time of the birth, and possesses no means for making any inquiry as to that fact (m). * 1117

It seems also that the herald's original visitation books are evidence for the same purpose, since it was their business to make out pedigrees (o). So are inquisitions *post mortem* (p).

(i) *Doe d. Johnson v. Earl of Pembroke & another*, 11 East, 504.

(k) *Guildford Lent Assiz.* 5 Geo. 1. 12 Vin. Ab. T. b. 87, pl. 5.

(l) *Supra*, Vol. I. p. 174.

(m) So held in a case in the K. B. Mich. T. 2 Geo. IV. MS.

(n) *Goodright v. Moss*, Cowp. 591. 3 Bl. Comm. c. 7. B. N. P. 233. 10 East, 120. A public register does not prove the time of birth. Cowp. 592.

(o) *Steyner v. Burgesses of Droitwich*, Skinn. 623. But see the animadversions upon these documents in that case; and 12 Vin. Ab. Ev. T. b. 87. And note, that a charter of pedigree is not evidence, without showing the books and records whence it is deduced, although the heralds swear that the pedigree was deduced out of the records and ancient books in the office. *Earl of Thanet's case*, T. Jones, 224; and Vin. Ab. Ev. T. b. 87. And see *Zouch v. Waters*, ib.

(p) Inquisitions *post mortem*, whilst they were in use, frequently afforded great facilities for tracing descents (see 13 Ves. jun. 143). These, under the feudal system, were taken before the justices in Eyre, upon the death of a person of fortune, to inquire into the value of his estate, the tenure by which it was holden, and who, and of what age, his heir was, and thereby to ascertain the relief and value of the primer seisin, or the wardship and livery accruing to the heirs thereon. These at last, having been greatly abused, were abolished in the reign of Hen. VIII., and the court of Wards and Liveries erected in their stead. See 2 Bl. Comm. 69. 32 Hen. VIII. c. 46. 4 Inst. 198.

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General reputation.

- * 1118 With respect to general reputation, it is to be observed, that the public has an interest in the state of each of the individual families of which society is composed ; the whole mass, from the highest to the lowest ranks, is bound together by the connecting ties of marriage and consanguinity. Society in general, therefore, has not only an interest in knowing, but possesses the * means of knowing, from its connection with each individual family, the state of that family, and the members of which it consists, and their various degrees of kindred. The laws which exclude the marriages of parties within certain limits of consanguinity, and those also which regulate the descent of real and the distribution of personal property, according to known and settled rules, make it a matter of interest, as well as duty and necessity, that the various degrees of relationship, not only in each individual family, but also in those with which it is connected, should be ascertained and known. The public forms of solemnizing marriages, births and deaths, tend also to the same end. Lastly, it may be remarked, that no fraud can usually be practised in affairs of this nature which will not probably interfere with the rights of individuals connected with the family ; and that the difficulty of practising such impositions successfully, and the vigilance with which they are likely to be watched, not alone by those whose interests are likely to be prejudiced by them (*q*), but by those who are actuated merely by a spirit of curiosity, so apt to be excited in such affairs, powerfully conspire to support the authority of this species of evidence.

- * 1119 Hence it is that not only the particular and specific declarations as to the state of a family, made by those connected with it, are admissible with a view to pedigree, but so also is *general reputation*, as that *A.* was the father, or *B.* the husband of *C.* Such reputation or general opinion may be * presumed to be the general result in the opinion of the public, founded upon actual knowledge and observation of the acts, conduct, and declarations of the family tending to that conclusion (*r*).

(*q*) Even the most abject poverty does not exempt the parties from rigorous observation ; the omission of the marriage ceremony, or the unlawful repetition of it, seldom escapes the scrutinizing eye of the parish-officer, who, with a view to parochial interests, prosecutes for bastardy, bigamy, &c. according to the exigency of the case.

(*r*) Le Blanc, *J.* observed (10 East, 120) that reputation was no other than the hearing of those who might be supposed to have been acquainted with the fact handed down from one to another.

It seems, however, that evidence of reputation must be of a general nature, such as that *A.* was generally reputed to be the son of *B.* or the father of *C.*, although a much greater latitude is allowed to traditionary declarations; for although it is probable that the general fact of relationship would be matter of public notoriety and discussion, it is not to be presumed that the same would happen with respect to particular declarations or circumstances of a domestic nature, but that, on the contrary, the knowledge of the latter would be confined to a few who were either members of the family, or closely connected with it (*s*).

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General reputation.

It has been doubted, whether general evidence of heirship be sufficient to warrant the finding one person to be heir to another; or whether it be not necessary that the claimant shall prove that he and the deceased were descended from some common ancestor, or at the least from two brothers or sisters (*t*) (1).

Upon an ejectment, Thorn, the lessor of the plaintiff, gave slight evidence of a reputed relationship between himself and the person last seised, and of acknowledgments that the Thorns were his heirs at law, but made no deduction of pedigree, nor was able to state how the relation arose, or who was the common ancestor, or whether any ancestor of Thorn was a brother or sister to any ancestor of the deceased. The jury found for the plaintiff. Upon a motion for a new * trial it appears that the court did not agree upon the general question; but the judges agreed in opinion that the evidence was too loose and insufficient to

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(*s*) *Vide supra*, Vol. I. p. 60.

(*t*) 2 Bl. Rep. 1099.

(1) [In *Chapman v. Chapman*, 2 Conn. Rep. 347, it was held, that in order to make hearsay admissible evidence of relationship on a question of title to land, it must come from persons having a connexion with the party to whom it relates; and that it is essential that such persons be named, and that the declarations should specify such relationship as makes the party, to whom they refer, heir to the land in question. See *Butler v. Haskell*, 4 Desauss. 651. In *Jackson v. Cooley*, 8 Johns. 128, the lessor of the plaintiff, in an action of ejectment, resided in England, and claimed as heir of the person who died seised of the land in question: A witness here deposed that he knew the ancestor, and had charge of the land as his agent, and corresponded with him; and after his death, corresponded with the lessor, who sent him a power to act for him as heir and devisee—and that his information was also derived from persons acquainted with the family of the lessor: It was held that this was sufficient evidence, *prima facie*, of pedigree or heirship to go to the jury. See *Supra*, 1103, note (1). *Post*, 1121, note (1).]

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General reputation.

prove even general kindred (u). Upon showing cause against the rule for a new trial, the plaintiff's counsel cited the case of *Newton and the Corporation of Leicester and the Attorney General*, as having been tried at Leicester about eight years before, where the lessor of the plaintiff obtained a verdict, although there was no deduction of pedigree, because it was proved that the deceased used to call him cousin.

Proof of death.

The *onus* of proving the death of a person once known to be living is incumbent on the party who asserts the death; for it is to be presumed that he still lives, till the contrary be proved (x). But it seems that the presumption of the continuance of life ceases at the end of seven years from the time when the party was last known to be living (y), in analogy * to the Statute of Bigamy (z), and the statute concerning leases for lives (a).

* 1121 Proof by an elderly person that a member of her family went to the West Indies many years ago, when he was a young man, and that according to the repute of the family he died there, and that she never heard of his being married, is *prima facie* evidence that the party died without lawful issue (b) (1).

(u) *Roe d. Thorn v. Lord*, 2 Bl. Rep. 1099. Note, the argument urged in favour of a strict deduction was, that if it were unnecessary, the estate might be carried, contrary to the rules of descent, to the *half-blood*, to the maternal instead of the paternal line, &c. It would surely be going a great length to admit a mere presumption in favour of so harsh a rule as that to which excludes relations of the half-blood to rebut a reasonable presumption, when once established by any means, that the claimant is the real heir; and the danger of preferring the maternal to the paternal line cannot arise where there is but one claimant, who, whether he claimed through the paternal or maternal line, would still be entitled in preference to a mere stranger. The judges, who held that strict deduction was necessary, founded their opinion on the doctrine relating to real actions, conceiving that the same deduction of descent which ought to be pleaded in real actions, ought to be given in evidence in ejectment, in order to make out a title by descent. *Quare*.

(x) Per Lord Ellenborough, in *Doe v. Jesson*, 6 East, 80. *Roue v. Hasland*, 1 Bl. Rep. 404. And see *Doe v. Deakin*, 4 B. & A. 433. B. N. P. 233. 294, 5. Cowp. 591.

(y) See tit. *Presumption*.

(z) 1 Jac. I. c. 11, s. 2.

(a) 19 Car. II. c. 6.

(b) *Doe d. Banning v. Griffin*, 15 East, 293.

(1) [General reputation and tradition of a family, of the death of one of its members, &c. may be admitted in evidence. *Panceast v. Addison*, 1 Har. & J. 356. See *Jackson v. Boneham*, 15 Johns, 226. *Ewing v. Savary*, 3 Bibb, 236. Letters

It is now perfectly settled that the parents are competent to prove or disprove their marriage (c), or to establish the legitimacy or illegitimacy of a child, by proof that it was born after or before marriage. A mother has been allowed to prove a clandestine marriage, in the Fleet, to the father of the child, previous to its birth (d); and the dowager Countess of Anglesea was admitted in the House of Lords to prove her marriage with the Earl of Anglesea previous to the birth of their son, Lord Valentia, where the question was as to the legitimacy of the latter (e). So the evidence of parents is admissible to bastardize their own issue (f), by proof that they have never been married. But such evidence is open to great observation (g).

The wife is competent to prove acts of incontinency with others, because, as it is said, this is a matter peculiarly confined to her own knowledge; but it is fully settled that neither the wife nor the husband can * prove the fact of * 1122 non-access (h), a rule founded upon grounds of policy and of decency (i).

Where the parties, if living, would have been competent witnesses to negative the marriage, their declarations to that effect are evidence after their decease (k). Declarations.

The declaration of the father is, after his death, admissible to prove that the son was born before the marriage (l).

(c) Cowp. 593.

(d) Per Lord Mansfield, Cowp. 593.

(e) Ap. 22d, 1771; and per Lord Mansfield, Cowp. 594.

(f) *R. v. Bramley*, 6 T. R. 330. *St. Peters v. Swinford*, B. N. P. 112.

(g) Per Lord Kenyon, 6 T. R. 330.

(h) *R. v. Reading*, B. N. P. 112. *R. v. Kea*, 11 East, 131. *Re v. Book*, Sayer, 61. 1 Wils. 340. [See tit. *Bastardy*, & notes.]

(i) Per Lord Mansfield, Cowp. 594; and per Lord Ellenborough. 11 East, 133.

(k) *R. v. Bramley*, 6 T. R. 330. B. N. P. 112. *May v. May*, *ibid*.

(l) *Goodright v. Moss*, Cowp. 591. *May v. May*, B. N. P. 112; where, upon an issue out of chancery, the preamble of an act of

Letters purporting to have been written in a foreign country, by a widow, in which she speaks of the death of her husband, and of the existence of children by him—and testimony of a third person that he had seen a letter from the husband, in which he mentioned his marriage and his children—and reputation in the vicinity that the husband had died abroad leaving children—are not admissible evidence for the tenant in a real action, wherein the demandant (a co-heir of such supposed deceased) claims title by descent—the tenant not claiming under him or his heirs. *Crouch & ux. v. Eveleth*, 15 Mass. Rep. 305. Whether such evidence would be admissible in a suit against the demandant by persons claiming as heirs at law of the supposed deceased—*Quare. ibid.*]

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But as the evidence of parents would not be received in their life-time to prove the bastardy of children born during marriage, by evidence of non-access, so neither are their declarations to that effect admissible after their death (m).

PENAL ACTION.

Particulars of
proof.

IN an action of debt to recover a penalty under a statute, issue being joined, on the usual plea of *nil debet*, it is necessary to prove,

1st. The affirmative of all the essential averments.

2dly. In *qui tam* actions, that the offence was committed within the county, &c.

3dly. That the action was commenced within time, &c.

* 1123
Proof of aver-
ment.

* It has been seen, that where a person is charged with a criminal omission, the proof of the negative lies upon the party who makes the charge (n); where, however, the action is founded on the doing an act without a legal qualification, the existence of which, if it exist at all, is peculiarly within the knowledge of the defendant, it seems to be incumbent on him, notwithstanding the rule, to prove his qualification (o).

Variance.

Where a contract is averred, a material variance will be as fatal as in an action of *assumpsit*. Where the plaintiff declared for a penalty for fraud in the measuring of coals purchased from the defendant by *A.* and *B.*, and it appeared in evidence that the purchase was made by *A.* *B.* and *C.*, the variance was held to be fatal (p), although a separate delivery was made to *A.* and *B.* of their shares. The same was held where the plaintiff declared for a penalty for an illegal insurance of a particular lottery ticket for the sum of 42*l.*, and it turned out that this sum had been given for that and other tickets (q).

parliament, reciting that the plaintiff's father was not married, and to the truth of which he was proved to have been sworn, was given in evidence, yet, upon proof of a constant cohabitation, and his owning the mother upon all other occasions to be his wife, the plaintiff obtained a verdict.

(m) *Cowp.* 591.

(n) *Supra*, Part III. 378.

(o) *Supra*, tit. *Game*.

(p) *Parish*, q. t. v. *Burwood*, 5 Esp. C. 33. *Everett v. Tindall*, 5 Esp. C. 169. *Vide supra*, 354; *R. v. Goddard*, Leach, 617; *infra*, note (s).

(q) *Philips*, q. t. v. *Mendez da Costa*, 1 Esp. C. 59. *Secus*, if the

And the same proof must be given of a contract where the evidence of a contract is essential, as in an action on the contract. Thus, in an action against a master of a vessel for hiring a deserter from another ship, if the prior hiring was by contract in writing, it must be produced and proved, and cannot be proved by the parol evidence of the deserter (*r*).

* In debt for using a trade without having served an apprenticeship, it was held that it need not be proved that the defendant used it for the whole of the time laid in the declaration, provided that it was alleged that he forfeited 40s. for every month (*s*), and proved that he used the trade for a month together.

* 1124
Amount of penalties.

Where several lottery tickets are insured at the same time, one penalty only can be recovered (*t*); but it is oth-

declaration does not aver a particular premium, but a particular premium is proved to have been given. *Ibid*.

(*r*) *Martin v. Greenleaf*, 2 Esp. C. 729.

(*s*) *Powell, q. t. v. Farmer*, Peake's C. 57. Under the statute 5 Eliz. c. 4, s. 31, this branch of the statute was repealed by the statute 54 G. 3. c. 96. The averment of the trade is material. Averment of the trade of a sawyer is not proved by evidence of setting to work in the trade of a mast and block-maker. *Spencer v. Mann*, 5 Esp. C. 110. But *semble*, a mis-description of the master's trade would not be material. *ib*. See *Beech v. Turner*, 4 Bur. 2449.

(*t*) *Holland v. Duffin*, Peake's C. 58. So under the stat. 29 C. 2. s. 7, which enacts that no tradesman, artificer, workman, labourer, or other person, shall do or exercise any worldly labour, business or work of their ordinary calling on the Lord's Day, except works of necessity and charity, and except dressing of meat in families, or dressing and selling of meat at inns, cook's shops, or victualling houses, for such as cannot otherwise be provided, &c. on pain of forfeiting 5s. &c.; it was held, that a baker who exercised his trade on a Sunday could not be convicted in more than one penalty in respect of the same Sunday, and that there could be no more than one offence on one and the same day. *Crepps v. Durden*, Cowp. 640. So if an unqualified person kill several hares on the same day, he cannot, it is said, be convicted in so many different penalties, as the offence for which the statute gives the forfeiture is the keeping of dogs and engines, and not the killing the hare. *R. v. Matthews*, 10 Mod. 26. *Supra*, 623, and per Lord Kenyon, in *Pechell v. Layton*, 2 T. R. 512. *Marriott v. Shaw*, Com. Rep. 274. Yet *qu*. whether every distinct instance of killing a hare be not a different using of a gun, &c. to destroy game? For the statute is in the disjunctive, *keep or use*. See *R. v. Filer*, 1 Str. 496. *R. v. King*, 1 Sess. C. 88. In the case of *Brooke v. Milliken*, 3 T. R. 509. it was held that several penalties might be incurred on the same day, on the 12 G. 2. c. 36. for distinct acts of sale of books reprinted in another country, which were originally printed and published here. If a man first shoot a hare, and afterwards, though on the same day, shoot a pheasant, it seems that the acts of using are as distinct as the acts of sale were in *Brooke v. Milliken*.

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erwise where several tickets are insured at different times, although on the same day (*u*). But *the plaintiff cannot recover more penalties than are included in the affidavit to hold to bail (*x*).

* 1125

Penalty.

If the Jury find a *general* verdict for one penalty, it is for the plaintiff to apply it; but, after applying it to one count which turns out to be defective, he cannot afterwards apply it to another, although the evidence would have warranted a verdict on the latter (*y*).

Within the
county, &c.

2dly. *Within the county*.—An offence against a penal statute must in general be alleged and proved to have been committed within the proper county (*z*) (1). A variance in this respect is matter of defence upon the trial (*a*).

Contract.

Where a contract was made for the purchase of coals, without stating the specific quantity, it was held that the offence of selling coals of a different description from those contracted for, was committed in the county where the coals were delivered, the *contract having been made in a different county (*b*). But the not justly measuring such coals, being a local omission contrary to a local act, is completed at the place where the coals are kept for sale, and

* 1126

(*u*) See *Brooke v. Milliken*, 3 T. R. 509. and the preceding note.

(*x*) *Phillips v. Mendez da Costa*, 1 Esp. C. 34.

(*y*) *Holloway v. Bennett*, 3 T. R. 448. *Hardy v. Cathcart*, 5 Taunt. 11.

(*z*) By the stat. 31 Eliz. c. 5, s. 2, which enacts that the offence against any penal stat. shall not be laid to be done in any other county than where it was in truth done. This statute extends to all actions by common informers upon a penal statute, whether made before or after that statute (B. N. P. 194. Com. Dig. *Action*, N. 10. 2 T. R. 238. 2 B. & P. 381. *Barber v. Tylson*, 3 M. & S. 429.) The statute, however, contains some exceptions as to informations by the Attorney General in the exchequer, champerty, &c.

By the stat. 21 Jac. I. c. 4, all informations either by or on behalf of the King, or any other, for any offence against any penal statute, shall be laid in the county where, &c. This statute, it has been held, does not apply to offences created by subsequent statutes (3 M. & S. 438. B. N. P. 195. 1 Salk. 372, 3). And neither of these statutes extends to actions brought by the party grieved. *Ibid.* and B. N. P. 195.

The venue of an information for being a tanner and shoemaker under the stat. 24 G. 2. c. 19, need not be within the county. *Attorney General v. Farris*, 3 Anst. 871.

(*a*) 4 East, 385. [See *Yelv.* 12 *a.* note (2)].

(*b*) *Butterfield v. Windle*, 4 East, 385, under the stat. 3 Geo. II. c. 26.

(1) [An action upon the statute of New Jersey, for restraining certain persons from navigating the waters between that State and New York, was held to be transitory. *Gibbons v. Ogden*, 1 Halsted's Rep. 285. See *Gilbert v. Marcy*, Kirby, 401.]

where the bushel is required to be kept for the purpose of measuring (c).

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The offence of driving a distress out of the hundred is not complete till the cattle have entered the second hundred; and if the latter hundred be situated in a different county, the defendant will be liable to be nonsuited if the *venue* be not laid there (d).

Within the
county.

Where a draft was given for usurious interest in the county *A.*, and the money was actually received on the draft in the county *B.*, it was held that the offence was committed in the latter county (e).

An action for non-residence, although the offence consist in an omission, must be brought in the county where the living is situate (f).

In an action of debt for using a trade without having * served an apprenticeship, it must be proved that the defendant exercised the trade for one entire month (g) within the same county (h). * 1127

Although the *venue* be changed into another county for the purpose of trial, the cause of action must still be proved to have accrued in the county where the *venue* is laid (i).

Where part of the penalty sued for is given by the statute to the poor of the particular parish where the offence was committed, evidence is also requisite to prove that the Parish.

(c) *Butterfield v. Windle*, 4 East, 385, under the stat. 3 Geo. II. c. 26.

(d) *Pope v. Davies*, 2 Camp. 266; and see *Platt v. Lock*, Plow. 35. Sav. 58.

(e) *Scurry v. Freeman*, 2 B. & P. 381. And see *Wade*, q. t. v. *Wilson*, 1 East, 195; where it was held, that if a premium be taken at the time of an usurious loan, receiving interest at the rate of 5l. per cent., the offence is complete as soon as any interest is received. If an usurious contract be entered into by a deed executed in London, appointing the lender to be the receiver of the borrower's rents in Middlesex, with a pretended salary, and the lender receive the rents in Middlesex, but settle for the balance with the borrower in London, the *venue*, in an action on the statute, is well laid in London (*Scott*, q. t. v. *Brest*, 2 T. R. 238); and per Ashhurst, it might be laid either in London or Middlesex (ibid. 240). As to the *venue* in cases of *conspiracy*, *game*, *libel*, &c. see those titles respectively; as to the *venue* in case of indictments, see Starkie's *Crim. Pleadings*, Ch. I.

(f) In the K. B. MS.

(g) *R. v. Barnett*, 3 Camp. 344.

(h) *Cunningham v. Watson*, 3 Camp. 249.

(i) *Robinson v. Garthwaite*, 9 East. 296. See the stat. 38 Geo. III. c. 52, s. 1.

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IV.

Parish.

* 1128

Commence-
ment.

offence was committed in that parish according to the allegation in the information or declaration (*k*).

It is sufficient if the parish be described by its popular and well-known name, although that be not the name of its consecration (*l*); but where, in an * action to recover penalties for non-residence, the parish was described to be *St. Ethelburg*, and it appeared, on the defendant's evidence, that the name was *St. Ethelburga*, the variance was held to be fatal (*m*).

3dly. *The commencement within time, &c. (n)*—The suing out a *latitat* is a commencement of the action (*o*).

(*k*) See *R. v. Lookup*, 4 Burr. 2018. *Evans v. Stevens*, 4 T. R. 224. *R. v. Priest*, 6 T. R. 538; the statute gave a part of the penalty to the overseers of the poor where the offence was committed, and in the conviction it was adjudged to be paid to the overseers of the *township* of Ullesthorpe, the fact having been alleged at Ullesthorpe; and the Court were of opinion that the conviction was irregular. In *R. v. Wyatt* (2 Ld. Raym. 1478), in a similar case, where the offence was laid to have been committed *apud Villam de Mottram Andrews*, the Court, after conviction, said that they would intend that the parish was coextensive with the vill, and that if the vill was extra-parochial, the informer would have the whole.

(*l*) *Williams v. Burgess*, 3 Taunt. 127. And see *Kirland v. Pounsett*, 1 Taunt. 570. *Burbidge v. Jakes*, 1 B. & P. 225. In an action of debt on the stat. 3 Hen. VIII. c. 11, against Dr. Leigh for practising physic in the parish of St. George's in the East, within seven miles of the city of London, it appeared, from the consecration-deed that the name of the parish was St. George's in the county of Middlesex; but Lee, C. J. held it to be well enough, for it was more generally known by the former than by the latter description. And see *Wilson q. t. v. Van Mildert*, 2 B. & P. 394; where it was held that three united parishes might be described in pleading as one rectory.

(*m*) *Wilson v. Gilbert*, 2 B. & P. 281.

(*n*) By the stat. 31 Eliz. c. 5, s. 5, all actions, indictments, &c. brought for any forfeiture upon a penal statute, whereby the forfeiture is limited to the King only, shall be brought within two years, &c.; where the benefit is limited to the King and the informer (except where the action, &c. is brought on the Statute of Tillage), within one year; or on default then by the King, within two years, &c. Upon the construction of this statute, and that of 7 Hen. VIII. c. 3, where the penalty is given to a common informer alone, the action must be brought within one year (*Lookup v. Sir T. Frederick*, Mich. 6 Geo. III. B. N. P. 195, where the action was brought on the Stat. 9 Ann. c. 14); and it extends to all actions upon penal statutes, whereby the forfeiture is limited to the King, or to the King and a common informer, whether made before or since the stat. 31 Eliz.; but it does not extend to actions brought by the party grieved. 1 Ld. Ray. 78.

(*o*) *Hardyman v. Whitaker*, 2 East, 578. n. *Culliford v. Blandford*, Carth. 232, by two Judges, Holt, C. J. dissent. For other observa-

The production of the writ shows that a *qui tam* action was commenced in time, although there be no evidence to connect the writ with the action (*p*), provided the declaration appear to have been filed in time (*q*); but the record of an issue in the Common Pleas does not prove the time of filing the declaration (*r*). Commence-
ment.

* The writ may be produced in order to show that the action has been commenced within time, after the objection has been taken (*t*). * 1129

In an action for penalties for using a trade without having served an apprenticeship, no penalty can be recovered which was completely incurred a year before the action brought; for each month's employment is a distinct offence (*u*).

The defendant may, under the general issue of *nil debet*, avail himself of any proviso, either in the principal statute, or any other which exempts him from the penalty, by evidence that he is, in point of fact, within the exemption (*x*). But the defendant cannot, under this issue, prove that the penalties have already been recovered by a stranger; for the fact ought to have been pleaded, in order to give the plaintiff an opportunity of replying that the recovery was fraudulent (*y*). Defence.

An offence against a penal statute cannot be punished

tions and decisions connected with this subject, vide *supra*, tit. *Justices*, 796—*Hundred*, 679; & *infra*, tit. *Time*.

(*p*) *Hutchinson v. Piper*, 4 Taunt. 555.

(*q*) 6 Taunt. 141. 1 Marsh. 497.

(*r*) In *Thistlewood v. Cracroft*, 6 Taunt. 141. 1 Marsh. 497, the writ was returnable Easter 1813, but had not been returned; the issue was of Hilary 1815, and the plaintiff produced rules for time to declare from Mich. 1813 to Trin. 1814; and it was held that this was not sufficient evidence to show that the declaration had been filed in time. Vide *supra*, 796.

(*t*) *Maugham v. Walker*, Peake's C. 163; where the plaintiff, after he had closed his case in a penal action, and after an objection had been taken to the insufficiency of the evidence, offered further evidence in order to remove the objection, Lord Ellenborough said that he would receive it, if the omission arose from inadvertence on the part of the plaintiff's counsel, but not otherwise. *Alldred v. Halliwell*, 1 Starkie's C. 117.

(*u*) *Evans v. Hunter*, 2 Camp. 293.

(*x*) B. N. P. 225. 2 Roll. Ab. 683. *R. v. Hall*, 1 T. R. 320. It was formerly held otherwise where the exemption was contained in another act, or where it contained matter of law. Gilb. L. Ev. 11. [See *United States v. Hayward*, 2 Gallison, 485.]

(*y*) *Bredon v. Harman*, 1 Str. 701; *supra*, Vol. I. p. 207; and see the statute 4 H. 7 c. 20.

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after the repeal of the particular clause creating the offence, although the offence was committed previous to the repeal of the act, unless the repealing statute contain some special exemption (z).

* 1130
Competency.

* An informer who is entitled to any part of the penalty is, it has been seen, incompetent to give evidence (a); but in some instances such informers are made competent by the express provisions of particular statutes (b); and in some other instances also, informers have been held to be competent, by necessary inference from particular statutes, on the consideration that such statutes would otherwise be in a great measure nugatory (c).

PENALTY.

THE question whether a particular sum specified in a covenant or other agreement was intended as a penalty, or as liquidated damages, depends upon the form of the instrument, and the intention of the parties, as collected from the whole of the instrument. This is purely a question of law; but it is necessary to advert to it in order to ascertain whether the party must be prepared with evidence to prove the actual damage sustained from the breach of contract, or * according to the contract, he is entitled to a specific sum on proof of any breach of the agreement. If the sum be mentioned simply under the denomination of a penalty, on an agreement not to do a specified thing, or to secure some advantage to an obligee, such as the use of a

* 1131
Form of the
instrument.

(z) *Miller's Case*, 1 Bl. Rep. 451. [See *Hollingsworth & al. v. Virginia*, 3 Dallas, 378. *U. States v. Passmore*, 4 Dallas, 372.]

(a) *Supra*, 776.

(b) See the stat. 32 Geo. III. c. 56, s. 7, which prohibits counterfeit certificates of the characters of servants. And see the Hackney-coach Act, 33 Geo. III. c. 75, s. 17. See the statute 1 Geo. IV. c. 56, as to malicious trespasses. And see also as to Parishioners, *supra*, 777.

(c) As in the case of the Bribery Act, 2 Geo. II. c. 24; & *supra*, 761. See *Heuward v. Shipley*, 4 East, 182. *Bush v. Ralling*, Say. 289. *Mead v. Robinson*, Willes, 425. So in a prosecution under the stat. 21 Geo. III. c. 37, against exporting machinery (*R. v. Teasdale*, 3 Esp. C. 68). So under the stat. 23 Geo. II. c. 13, s. 1, for seducing artificers to leave the kingdom, although the informer is entitled to half the penalty (*R. v. Johnson*, Willes, 425, n. (c)). So on a prosecution for penalties under the stat. 9 Ann. c. 14, s. 5, the loser of money at play is competent to prove the fact. *R. v. Luckup*, Willes, 425, (c).

particular room (*d*), the form of the instrument imports it to be a mere penalty (*e*).

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But although the terms of the instrument *prima facie* import liquidated damages, they will not be considered as such if a contrary intention be manifested by the terms of the instrument. Thus, although the agreement concluded in this form, "Lastly, it is hereby agreed, that either party failing to perform their undertaking shall pay to the other 200*l*."; although this appeared to be contract, and not penalty, the Court *held that they were to look to the whole of the instrument (*f*).

Intention.

* 1132

Thus, if a smaller penalty be by the same instrument made payable upon the breach of part of the agreement, this rebuts the presumption that the parties intended the larger sum to be paid for the same breach (*g*).

Intention of
the parties as
collected from
the instrument.

So it is if the deed or agreement contain a number of different covenants or stipulations, and a large sum be, at

(*d*) *Smith v. Dickenson*, 3 B. & P. 630. *Sloman v. Walter*, 1 Brown's C. C. 418. Lord Hardwicke, in *Roy v. the Duke of Beaufort* (2 Atk. 190), held that a person who entered into a bond conditioned to pay 100*l*. if he poached, must have paid the 100*l*. for any breach. But see Lord Eldon's observations (2 B. & P. 352), where he says with respect to the case of *Hardy v. Martin*, (1 Brown's C. C. 418, in note), "I do not understand why one brandy merchant, who purchases the lease and goodwill of a shop from another, may not make it matter of agreement, that if the vendor trade in brandy within a certain distance he shall pay 600*l*., and why the party violating such an agreement should not be bound to pay the sum agreed; although, if such an agreement be entered into in the form of a bond with a penalty, it may perhaps make a difference." The stat. 8 & 9 Will. III. c. 11, s. 8, seems to be imperative as to the assignment of breaches in all cases, except money-bonds, bail-bonds, replevin bonds, &c. See Tidd's Prac. 604, 7th edit. and *supra*, 309.

But where one gave a counter security to pay an annuity, and a warrant of attorney as a collateral security, and it was agreed that in default of any one payment of the annuity, judgment should be entered up for the specific price of annuity, it was held that execution might issue for the whole sum, without assigning breaches under the statute. *Hovell v. Stratton*, 2 Smith, 66.

(*e*) Per Lord Eldon, 2 B. & P. 352.

(*f*) Per Lord Eldon, in *Astley v. Weldon*, 2 B. & P. 346. The plaintiff in that case agreed to pay to the defendant so much per week for performance at his theatres, and to pay travelling expenses, &c.; the defendant agreed to perform the parts required by the plaintiff; to attend beyond the usual hours on emergencies, and at rehearsals, or to be subject to such fines as are established at the theatres; and notwithstanding the general conclusion, it was held, (in an action of *assumpsit*, stating several breaches in refusing to perform and attend, &c.) that the sum mentioned was a penalty, and not liquidated damages.

(*g*) *Astley v. Weldon*, 2 B. & P. 346, *supra*, note (*f*). *Fletcher v. Dyche*, 2 T. R. 32.

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IV.

To contract
for stipulated
damages.

the end, covenanted or agreed to be paid for breach of performance; for then the object appears to be to secure the performance of the agreement in general, and it is not to be presumed that the parties intended that the whole should be paid for the breach of any one article (h) (1).

Where the party binds himself to pay a specific sum as

(h) 2 B. & P. 353.

(1) [A. agreed in writing to convey to B. 700 acres of land, to be appraised, in part payment for a farm, valued at \$3,750, which B. agreed to sell to A.—and it was covenanted that if either party failed to fulfil the agreement, the party so failing “should forfeit and pay to the party who should fulfil the agreement, the sum of \$2000 as damages:” It was held that the \$2000 were to be considered as a penalty, and not as liquidated damages. *Dennis v. Cummins*, 3 Johns. Cas. 297. So in an action of covenant broken, wherein the declaration alleged that the parties were joint inventors of certain machines, and that they have mutually covenanted that one should have the use of them in two of the U. States, and the other in the rest, and that neither should use them within the district of the other, under the forfeiture of \$1000 for each machine so used. *Stearns v. Barrett*, 1 Pick. 451. So where A. covenanted with B. that he would not, for seven years, be interested in any voyage to the northwest coast of America, or in any adventure to that coast, or in any species of traffic with the nations of that country; and bound himself, his heirs, &c. in the sum of \$8000 for his faithful adherence to the contract. *Perkins & al. v. Lyman*, 11 Mass. Rep. 76. A promissory note for fifty dollars on demand, with condition to be void if the maker should permit the payee to use a certain building as long as it should stand, was held to be a contract with a penalty, and that the payee could recover only his actual damages for breach of the condition. *Merrill v. Merrill*, 15 Mass. Rep. 488.]

Where A., in consideration of \$500, covenanted to convey to B. fifty acres of land, by good warranty deed, on or before, &c., or in lieu thereof to pay him \$800; it was held that B. was entitled to recover, on a breach of the covenant, \$800 and interest, the same being in the nature of liquidated damages, and not a penalty. *Slosson v. Beadle*, 7 Johns. 72. (See the reporter's note to this case, 2d edition). Where a creditor covenants that he will not sue his debtor within a limited time, and that if he shall sue, the debtor shall be discharged of his debt—and the creditor notwithstanding commences an action for the debt within the time limited, and the debtor pleads the covenant in bar, and obtains judgment, he cannot afterwards maintain an action on the covenant against the creditor; for the forfeiture of the debt is not in the nature of a penalty, but it is a liquidation of the damages to be paid in case of a breach of the covenant by the creditor. *White v. Dingley*, 4 Mass. Rep. 433. Where one, in consideration of a dollar, agreed by his deed not to run a stage-coach on a certain road in opposition to the plaintiff's stage-coach, under a penalty of \$290; it was held that the said sum was liquidated damages; and the plaintiff recovered that amount for the defendant's violation of the agreement. *Pierce v. Fuller*, 8 Mass. Rep. 223.]

stipulated damages, or as a sum forfeited or due for non-performance of an agreement, such as not to continue in or to engage in a particular trade or business (i), or to pay a higher rent, in case of * non-residence, on an estate leased to him (j), or to pay a certain sum for every acre which he, being tenant, breaks up and converts into tillage (k), or to pay 1,000*l.* to the plaintiff if the defendant marry any other woman (l); and in general, as it seems, where a party enters into a contract, bottomed on a good consideration, to pay a stipulated sum in case he violates the contract, that sum is to be considered as stipulated damages (m).

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* 1133
Stipulated
damages,

It has been said, that if the sum would be very enormous and excessive, considered as liquidated damages, it shall be taken to be a penalty, though agreed to be paid in the form of contract (n). But Lord Eldon, in the case of *Astley v. Weldon* (o), disapproved of this doctrine. He observed, that "nothing can be more obvious than that a person may set an extraordinary value on a particular piece of land or wood, on account of the amusement which it may afford him. In this country a man has a right to secure to himself a property in his amusements, and if he choose, to stipulate for 5*l.* or 50*l.* additional rent * for every acre of furze broken, or for any given sum of money up-

* 1134

(i) *Barton v. Glover*, 1 Holt's C. 43, Cor. Gibbs, C. J. So in the case of a bond conditioned to pay 1,000*l.* in case the defendant renewed the business of a carrier (*Baker v. Webb*, Manning's Index, 230). In the case of *Hardy v. Martin* (1 Brown's C. C. 419, in note,) the court of Chancery restrained the plaintiff in such a case from taking out execution upon a penalty in the bond; but it does not appear that in that case the sum was mentioned in the condition of the bond. *Vide supra*, 1131, note (d); and see the observations of Lord Eldon on this case, 2 B. & P. 352.

(j) *Ponsonby v. Adams*, 6 Brown's P. C. 417.

(k) *Rolfe v. Peterson*, 6 Brown's P. C. 470.

(l) *Lowe v. Peers*, 4 Burr. 2229. [Wilmot, 364, S. C.]

(m) See the above cases, and Lord Eldon's observations, 2 B. & P. 351. The rule laid down by Lord Somers in equity (Prec. in Chan. 487) was, that where a party might be put in as good plight as where the condition itself was literally performed, the Court would relieve, although the letter had not been performed, as by payment of money, &c.; but that where the condition was collateral, and no recompense or value could be put on the breach of it, there no relief could be had for breach of it. Lord Eldon (in the case of *Astley v. Weldon*, 2 B. & P. 352) regretted that this rule had not been adhered to.

(n) Said to have been stated in *Rolfe v. Peterson*, 6 Brown's P. C. 470.

(o) 2 B. & P. 246. *supra*, note (f).

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on every load of wood cut and stubbed up, I see nothing irrational in such a contract ; and it appears to me to be exceedingly difficult to apply the word *excessive* to the terms in which parties choose to contract with one another. There is, indeed, a class of cases in which courts of equity have rescinded contracts on the ground of their being unequal. It has been held, however, that mere inequality is not a ground of relief; the inequality must be so gross that a man would start at the bare mention of it."

As the plaintiff is not entitled to recover the whole penalty unless he prove damages to that extent, he may, on the other hand, recover *damages* in covenant or *assumpsit*, if he prove that he has sustained them, although they exceed the amount of the penalty (*p*).

PERJURY.

Particulars of
proof.

On the trial of an indictment for perjury, the proofs relate to, 1st, the authority to administer the oath (*q*) ; 2dly, the occasion of administering the oath (*r*) ; 3dly, the taking of the oath (*s*) ; 4thly, the substance of the oath (*t*) ; 5thly, the materiality of the matter sworn (*u*) ; 6thly, the falsity of the matter so sworn (*x*) ; 7thly, the corrupt intention of the defendant (*y*).

Authority to
administer the
oath.

* 1135

1st. Where the affidavit or answer has been sworn before a master in Chancery, surrogate, or commissioner, who has a general authority to take such affidavits, it is not necessary to prove his appointment ; it * is sufficient, according to the general presumption of law (*z*), to prove his having acted in that character (*a*). But where he derives his authority from a special commission issued to him for that particular purpose, it is necessary to prove the authority by the production and proof of the commission which created the special authority. And in the former case the legal presumption derived from a person's acting

* (*p*) *Harrison v. Wright*, 13 East, 343. *Winter v. Trimmer*, 1 Bl. Rep. 395. *Bird v. Randall*, Ibid. 373. *Cottrell v. Hook*, Doug. 97. Contra, *Wilbeam v. Ashton*, 1 Camp. 78. [See *Graham v. Bickham*, 2 Yeates, 52. S. C. 4 Dallas, 149. *Perot v. Wallis*, 2 Dallas, 252.]

(*q*) 1134.(*r*) 1136.(*s*) 1138.(*t*) 1141.(*u*) 1143.(*x*) 1144.(*y*) 1145.(*z*) *Supra*, tit. *Character*, p. 372.(*a*) *R. v. Verelst*, 3 Camp. 432. *R. v. James*, 1 Show. 397.

in a particular capacity, that he had competent authority so to act, may be rebutted by positive proof that the appointment was illegal (b) (1).

Where the authority delegated is of a special nature, limited to particular circumstances, it is essential to prove their existence in order to show the authority to administer the oath. Thus, on an indictment against a bankrupt for perjury alleged to have been committed on his last examination before the commissioners, strict proof of the bankruptcy is necessary (c).

This proof is essential to show the authority of the commissioners; for if the defendant was not a bankrupt there was no authority to administer an oath.

On the same principle, where the perjury was assigned upon evidence given at the trial of a cause at *Nisi Prius*, where the suit had previously abated by the death of a complainant, for want of a suggestion * of the death according * 1136 to the statute (e), it was held that there was no jurisdiction, and consequently no perjury (f). The case seems to admit of a very different consideration where the perjury is assigned upon the deposition of a witness who comes to prove the bankruptcy; for there the commissioners have

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1. Authority
to administer
the oath.

(b) *R. v. Verelst*, 3 Camp. 432.—Where evidence was given that the surrogate by whom the oath had been administered had been appointed contrary to the canon, which requires that no judicial act shall be speeded by any ecclesiastical judge, unless in the presence of the registrar or his deputy.

(c) *R. v. Punshon*, 3 Camp. 96.

(d) *Ibid.*

(e) 8 & 9. Will. III. c. 11, s. 6.

(f) *R. v. Cohen*, 1 Starkie's C. 511.

(1) [On an oath administered out of the State of New York, by a judge of that State, it was held that no indictment for perjury would lie. *Jackson v. Humphrey*, 1 Johns. 498. Nor can a person be tried for perjury on an oath taken before a magistrate, who has taken the oaths of qualification before an unauthorized person or board. *The State v. Hayward*, 1 Nott & M'Cord, 547. It is not, however, necessary, in an indictment for perjury, under the statute of North Carolina, to state that the person holding the court, where the false oath was taken, is a judge of the Superior Courts. *The State v. Bryson*, 1 Car. Law Repos. 503.]

In Massachusetts, magistrates who administer the poor debtors' oath are authorized to do it without the limits of the prison liberties; and perjury may be assigned in an oath thus administered. *Commonwealth v. Alden*, 14 Mass. Rep. 388.

Perjury may be assigned in an oath erroneously taken; especially while the proceedings in which it was taken remain unreversed. *Van Sternbergh v. Kortz*, 10 Johns. 167.]

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2. The occasion of administering the oath.

jurisdiction to inquire into the fact, although it should ultimately turn out that there was no bankruptcy (g).

2ndly. If the perjury was committed on the trial of a cause at *Nisi Prius*, the record ought to be produced, in order to show that such a trial was had; the production of the *postea* will be sufficient for this purpose (h).

Where the oath was alleged to have been taken, and the matter sworn, by the defendant, before the honourable E. W., one of the justices of assize, &c. and it appeared in evidence that the oath had in fact been taken before Willes, J. in a cause tried at the assizes, it was held to be sufficient, although another justice was mentioned in the indictment as a commissioner (i): and the *Nisi Prius* record alleged the trial to have been had before both (1).

(g) *Supra*, p. 211.

(h) *R. v. Iles*, Sitt. in London, Mich. 14 Geo. II. Cor. Lord Raymond, B. N. P. 243. Hardr. 118. 1 Str. 162. 2 Haw. c. 46, s. 56. [*Respublica v. Goss & al.* 2 Yeates, 479, the *postea* must be produced.]

(i) *R. v. Alford*, Leach, 179, 3d edit.

(1) [Whether perjury, committed on a hearing in a criminal complaint before a District Judge, be within the stat. of U. States 30th April, 1790, ch. 9, § 18—*Quare*. *United States v. Clark*, 1 Gallison, 497. In *U. States v. Passmore*, Circuit Court, April 1804, it was held that the 18th section of the stat. abovementioned relates only to perjuries committed in judicial proceedings in the U. States' courts, and does not extend to all cases of perjury in depositions taken under the authority of the U. States. Wharton's Digest, 154. The stile of the court, before which the perjury is said to have been committed, must be legally set forth in the indictment. *The State v. Street*, 1 Murphey, 156.

Words imputing perjury, in testimony given before arbitrators, were held to be actionable. *Wetmore v. Lyman*, 2 Conn. Rep. 42. *z.* So a majority of the court of Connecticut held that words were actionable, which imputed perjury in testimony given before a meeting of members of a church acting as an ecclesiastical tribunal for the administration of church discipline—the oath having been administered by a justice of the peace.

False swearing in a voluntary affidavit, made before a justice of the peace before whom no cause is depending, is not perjury. *Shaffer v. Kintzer*, 1 Binney, 542.

In North Carolina, since stat. of 1791, c. 7, it is not necessary to set forth, in the indictment, the record of the cause in which the perjury is alleged to have been committed: If, however, it be set forth, it must be done correctly. *The State v. Ammons*, 2 Murphey, 123.

If an affidavit, made for the purpose of procuring an attachment to issue against a witness for a contempt, be used for the purpose of continuing the suit—an indictment for perjury, stating that it was made with the intention of being used for the continuance of the suit, is bad. *The State v. Williams*, Cam. & Nor. 474.

Where the indictment alleged that the cause came on to be tried before Lloyd Lord Kenyon, &c. *William Jones* being associated, &c. and from the judgment-roll it appeared that *Roger Kenyon* was associated, &c. the variance was held to be fatal (*k*).

* Where perjury is assigned on an answer to a bill in equity, the bill must be proved in the usual way (*a*). * 1137

Where the indictment alleged a bill of discovery filed in the Exchequer, (on the answer to which perjury was assigned) to have been filed on a day specified, viz. 1st of December 1807, and it appeared, on the production of the bill, to have been filed in the preceding Michaelmas Term, according to the practice of the Court where a bill is filed in the vacation, it was held that the variance was immaterial, the day not having been alleged as part of the document (*l*). The occasion, &c. Variance.

And where the bill was alleged to have been filed by Francis Cavendish Aberdeen, and others, and on the production of the bill it purported to have been filed by J. C. Aberdeen and others, the variance was held to be immaterial, evidence being given that Francis Cavendish Aberdeen and the other persons named, did in fact file the bill, although it was objected that it ought to have been averred in the indictment that Francis Cavendish Aberdeen, &c. filed their bill by the names of J. C. Aberdeen, &c. (*m*); and although, after setting out the material parts

(*k*) *R. v. Eden*, 1 Esp. C. 97.

(*a*) *R. v. Alford*, Leach, 179, 3d edit. Starkie's Crim. Pleadings, 2d edit. 115.

(*l*) *R. v. Hucks*, 1 Starkie's C. 521.

(*m*) *R. v. Roper*, 1 Starkie's C. 518; and afterwards by the Court of K. B. Hil. Term 1817. It was also objected in the same case, in arrest of judgment, that it was alleged that the defendant exhibited his answer in writing to the said bill, complaint, intitled,

At common law, one may be guilty of perjury in respect to a false oath taken by him in his own cause, in answer to questions put to him in a court of law having power to purge him on oath concerning his knowledge of the matters in dispute: But under stat. 5 Eliz. c. 9, (which is in force in Pennsylvania,) no other perjury is punishable but such as is committed by a witness. *Respublica v. Newell*, 3 Yeates, 413.

An indictment for perjury cannot be sustained on the 7th and 9th sections of the statute of the U. States, passed July 29th, 1813, ch. 34, granting a bounty to vessels engaged in the fisheries, unless the certificate required by the 7th sect. be sworn to by the same person who signs it: If the owner sign the certificate and the agent swear to it, the case is not within the statute. *United States v. Kendrick*, 2 Mason's Rep. 69.]

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of the bill, the * words were added, "as appears by the said bill filed of record."

Matter sworn.

Where the perjury was assigned in answer to a bill alleged to have been filed in a particular term, and a copy produced was of a bill amended in a subsequent term by order of the Court, it was held to be no variance, the amended bill being part of the original bill (n).

Taking the
oath.
Identity.

3dly. *The taking the oath.*—Where the perjury is assigned on an answer of the defendant in Chancery, the answer itself must be produced (o) from the proper office; and proof that the *jurat* is in the hand-writing of a master in Chancery, together with proof of the identity of the defendant, will be sufficient evidence of his taking the oath (p). But no return of commissioners, or of a master in Chancery, will suffice, without proof of the identity of the defendant with the * person so sworn (q); but proof of his signature to the answer will be sufficient (r).

Identity.

The question of identity is one of fact for the consider-

"the answer of Robert Roper, defendant, to the *bill of complaint of J. C. Aberdeen*," &c. and therefore that the answer could not be taken to be the answer to the bill of Francis Cavendish Aberdeen; and that the answer, being wrongly intitled, was to be considered as a mere nullity (*Bevan v. Bevan*, 3 T. R. 601); but the Court, after granting a rule to show cause, discharged the rule, being of opinion that the answer put in, although wrongly intitled, could not be considered to be a mere nullity.

Where the indictment charged perjury before a select committee, and averred that the election was had by virtue of a certain precept of the high-sheriff, by him duly issued to the bailiff of the borough of New Malton, proof of a precept directed to the bailiff of the borough of Malton was held to be no variance, the precept having in fact issued to the bailiff of New Malton, for the averment was not used by way of description of the instrument (*R. v. Leese*, 2 Camp. 139.) The indictment also alleged that *A.* and *B.* were returned to serve as burgesses for the borough of New Malton, and it appearing by the indenture of return that they were returned as members for Malton, no variance was held to be fatal. *Ibid.*

(n) *R. v. Waller*, *Out. Eyre and Fortescue*, *Ja. Mich.* 6 Geo. I.

(o) *B. N. P.* 239. *Bac. Ab. Evidence*, 624.

(p) *R. v. Morris*, 2 Burr. 1189. 1 Leach, 50. *R. v. Benson*, 2 Camp. 508. 3 Mod. 116. *B. N. P.* 239. 1 *Ld. Ray.* 451. 2 Str. 1043. 3 P. Wms. 196. The reason for requiring all answers in Chancery to be signed by the parties is to afford easier proof on indictments for perjury. 2 Burr. 1189.

(q) *R. v. Morris*, 2 Burr. 1189; and *R. v. Brady*, Leach. 368. 3 Mod. 116. For some other person may have personated the defendant.

(r) *R. v. Morris*, Leach, 50. 3 Mod. 117. *B. N. P.* 239. 2 Burr. 1189.

ration of the Jury (s); but evidence of a conclusive nature is requisite in order to show that the defendant was the person who took the oath.

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Where it is possible that all the evidence may be true, and yet it be possible, consistently with that evidence, that some other person actually took the oath, the evidence is insufficient (t). But circumstantial proof, if conclusive in its nature, is sufficient (u). Identity.

* So it seems, that if a party produce an affidavit, pur-
porting to have been made by him before commissioners
in the country, and make use of it in a motion in the
cause, it will be evidence against him that he made it (x).
It is not necessary to prove that any use was made by the
defendant of the affidavit which he has sworn (y). * 1140
Proof of tak-
ing the oath.

(s) *Benson v. Olive*, Mich. 5 Geo. II.

(t) *R. v. Brady*, Leach, 368. The indictment there was on the stat. 31 Geo. II. c. 10, s. 24, for taking a false oath to obtain administration to a seaman, in order to receive his wages. The prisoner had obtained letters of administration to the effects of Michael Power, a seaman on board the *Pallas*, through Mr. Macintosh, a navy agent, representing himself to be Thomas Power. From the warrant and jurat it appeared that a man of the name of Thomas Power had taken the usual oath. The warrant was signed by the name of Thomas Power, and the jurat attested by Dr. Harris; but there was no evidence that the signature was in the hand-writing of the prisoner, or direct evidence that he was the man who took the oath. It also appeared that some person had signed the bond by the name of Thomas Power; but there was no evidence that this person was the prisoner. The prisoner afterwards applied to a navy agent with a certificate, signed by the purser of the ship *Pallas*, and an order to receive some prize-money. The case was left to the Jury by the Court, with an intimation that they ought to acquit, there being no positive and direct evidence of his having actually taken the oath, as is required in all cases of perjury, and as it was possible that the prisoner might have procured another to take the oath. The prisoner was acquitted.

(u) Upon an indictment for perjury, in falsely taking the freeholder's oath at an election of a knight of the shire, in the name of J. W., it appeared that a person polled in the name of J. W., on the second day of the election, and that the oath was administered to such person, who swore to his freehold, and place of abode; also that there was no such person; also that the defendant did in fact vote on that day; that he had no freehold; and that he afterwards boasted that he had done the trick, and was not paid enough for his job, and was afraid that he should be pulled down for his bad vote. It did not appear that the defendant voted in his own name, or in any other name than J. W., or that more than one false vote had been given on that day; and the evidence was held to be sufficient to warrant a conclusion of the Jury that the defendant had voted in the name of J. W. *R. v. Price*, alias *Wright*, 6 East, 323.

(x) *R. v. James*, 1 Show. 397. Carth. 220. Holt, 284. S. C.

(y) *R. v. Crossley*, 7 T. R. 315. But it is otherwise when the pro-

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IV.Variance as to
the oath.

The taking the oath must be proved as it is alleged; if it be averred that the defendant was sworn on the Holy Gospels, &c. and it turn out that he was sworn in some other manner, according to some particular custom, and not upon the Gospels, the variance would be fatal (z) (1).

It must appear that the oath was taken within the county where the indictment is tried. But a variance as to the place of taking will not be material; thus, if it be alleged to have been taken at Serjeants Inn in London, it is sufficient to prove that it was taken in Cheapside (a). Upon an indictment in Middlesex, it may be shown that the oath was in fact taken in * Middlesex, although the *jurat* state it to have been sworn in London (b).

* 1141
Substance and
effect, &c.

4thly. It is necessary to prove, in the next place, that the defendant swore to the *substance and effect* as alleged in the indictment; and mere variances between the record and the evidence, in letters, or even in words, will not be material, if they agree in substance (c) (1).

But it is necessary to prove in *substance and effect* the *whole* of that which the indictment alleges in substance and effect to have been sworn by the defendant, although the same count contains several distinct assignments of perjury (d); for the allegation that the defendant swore to the substance and effect of that which is set out, is an allegation that he swore to the whole of it, as much as an

ceeding is under the stat. of Eliz. See Stark. Crim. Pleadings, 121. In *R. v. Taylor* (Skinn. 403), it was held that the bare making of the affidavit, without producing and using it, was not sufficient.

(z) *R. v. McCarther*, Peake's C. 155. See *Rokeby v. Langston*, 12 Vin. Ab. T. b. 88. 2 Keb. 314.

(a) *R. v. Taylor*, Skinn. 403, Cor. Holt, C. J.

(b) *R. v. Emden*, 9 East. 437.

(c) See Starkie's Crim. Plead. 258, and the cases there collected; also *supra*, tit. *Label*, 845. *Infra*, tit. *Variance*.

(d) *R. Leefe*, 2 Camp. 134.

(1) [Persons conscientiously scrupulous of swearing on the gospels are permitted, in North Carolina, to be sworn with uplifted hand—it is perjury, however, if a witness, sworn in the latter manner, testify falsely, although he were not thus scrupulous of swearing in the former manner. *The State v. Whisenhurst*, 2 Hawks, 458.]

(1) [If a man is indicted for perjury in swearing that he did not execute a certain deed, and the jury find specially that he is guilty of perjury in *denying his signature*, no judgment can be rendered—for a deed may be executed without actual signing. *The State v. Avera*, 2 Taylor, 237.]

avermment that a defendant published a libel *secundum tenorem* is an averment that he published the whole (e).

It has been said, that in the case of perjury assigned upon evidence upon the trial of a cause, the prosecutor must prove the whole of the defendant's testimony (f), unless the perjury be assigned upon a point which first arose upon the defendant's cross-examination, in which case it is sufficient to prove the whole of the cross-examination (g).

Notwithstanding the authority cited in support of these positions, considerable qualifications seem to be necessary. The second position is indeed somewhat inconsistent with the first; for how can it be judicially or legally shown that the point did not arise upon the examination in chief, unless the evidence then given * be proved? Again, if the second position be correct, that it is sufficient to prove the evidence on cross-examination, if the point in question first arose then, upon the same principle, if the perjury was committed on the examination in chief, it would be sufficient to prove such part of the evidence upon that examination as related to the point in question. The object in requiring such evidence is to show that the assertions on which perjury is assigned have not been limited, qualified, or explained by other parts of the defendant's evidence. It seems therefore, that, at most, the rule amounts to this, that all the evidence given by the defendant in reference to the particular fact on which perjury is assigned, ought to be proved. And the rule, even to this effect, appears to be a doubtful one; for when it has once been proved that particular facts were positively and deliberately sworn to by the defendant in any part of his evidence, were falsely sworn to, it seems, in principle, to be incumbent on him to prove, if he can, that in other parts of his testimony he explained or qualified that which he had so sworn. * 1142

In *Dame Carr's case* (h), where the Court, on a trial at bar, held that an indictment could not be sustained upon an assignment of perjury assigned on the defendant's answer to a bill in Chancery, because the defendant had explained and limited her first answer by a supplementary

(e) See Lord Ellenborough's observations, *ibid.* *R. v. Mary Ann Taylor*, *Infra*, 1589.

(f) *R. v. Jones*, Cor. Lord Kenyon, Peake's C. 37.

(g) *R. v. Dowlin*, Peake's C. 170. [See *Commonwealth v. Knight*, 12 Mass. Rep. 274.]

(h) 1 Sid. 418.

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one, it was so held, not on the ground that it was incumbent on the prosecutor to have proved the whole, but because it was held that the defendant was at liberty to explain her first answer by means of her second.

Averments and innuendos.

* 1143

Where averments are introduced into the indictment, and also innuendos, with a view to give a peculiar sense and meaning to the expressions used by the defendant, and afterwards to assign the perjury accordingly * such averments and innuendos must be proved as alleged, for they constitute the substance and effect of the defendant's oath (i). But it is a general rule, that whenever an innuendo is superfluous, although it introduces new matter, it may be rejected as surplusage (k).

Materiality.

5thly. In order to show the *materiality* of the deposition or evidence of the defendant, it is essential, where the perjury is assigned in an answer to a bill in equity, to produce and prove the bill (l); or if the assignment is on an affidavit, to produce and prove the previous proceedings, such as the rule nisi of the Court, in answer to which the affidavit in question has been made (m).

If the assignment be on evidence on the trial of a cause, in addition to the production of the record, the previous evidence and state of the cause should be proved, or at least so much of it as shows that the matter sworn to was material. So also such prefatory circumstances and innuendos as are averred upon the face of the indictment for the same purpose, must be proved.

When the perjury is committed in an answer to a bill in equity, or in answer to affidavits on a rule to show cause, the materiality of the matter sworn to in such answer, and on which perjury is assigned, necessarily appear from the documents themselves; but where the perjury is assigned upon testimony given on the trial of a cause, evidence must be given in support of the averment of *materiality*. For this purpose it is not only necessary to show by the record what issues were joined between the parties, but

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also to prove so much * of what occurred at the trial as shows the bearing and materiality of the defendant's evidence.

(i) See Starkie's Crim. Pleadings, 118, 2d edit.

(k) *R. v. Aylett*, 1 T. R. 63. *Roberts v. Camlden*, 9 East, 93. Starkie's Crim. Pleadings, 120. *Wüner v. Hold*, Cro. C. 489. Cro. J. 153. Starkie's Law of Libel, 339.

(l) *Supra*, p. 1137. *R. v. Alford*, Leach, 179, 3d edit.

(m) *Ibid*.

The false oath amounts to perjury if it has any tendency to prove or disprove the matter in issue, although but circumstantially (n) (1).

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If a fact be alleged which is material, with reference to the knowledge of the defendant, it must be proved, and a variance from it will be fatal (o). Variance.

It is a general rule, that the testimony of a single witness is insufficient to warrant a conviction on a charge of perjury. This is an arbitrary and peremptory rule, founded upon the general apprehension that it would be unsafe to convict in a case where there is merely the oath of one man to be weighed against that of another (p). Falsity.

Nevertheless it very frequently happens, in particular cases, that the testimony of a single witness preponderates against the united testimony of many.

Although the testimony of more than one witness be necessary, yet it does not appear to have been held in any case that more than one witness is required in direct falsification of the defendant's oath; it seems to be suf-

(n) *R. v. Grieps*, 12 Mod. 142. As if he wilfully mis-state the colour of a man's coat, or speak to the credit of another witness. And see *R. v. Muscot*, 10 Mod. 195.

(o) *R. v. Hucks*, 1 Starkie's C. 521. There the indictment alleged that at the time of effecting a policy of insurance, purporting to have been underwritten by A., B., and others, on the 13th, &c. the defendant well knew a particular fact; on the production of the policy, it purported to have been underwritten by A. B. on the 15th, &c.

(p) Per Parker, C. J. *R. v. Muscot*, 10 Mod. 195. 2 Haw. c. 46, s. 10. 4 Bl. Comm. 150. But it is sufficient to prove the taking of the oath by means of one witness. Ibid.

(1) [Perjury may be committed in answering a question that has no relation to the issue, if asked with a design to impair the credit of the witness as to those parts of the case which are material and important to the issue—particularly if the witness be cautioned as to his answer. *The State v. Strat*, 1 Murphey, 124. To constitute perjury, it is not necessary that the particular fact sworn to should be immediately material to the issue; but it must have such a direct and immediate connexion with a material fact, as to give weight to the testimony on that point. *The State v. Hathaway*, 2 Nott & M'Cord, 118. But where a particular fact was material in the case, and the witness swore to the fact, and said he was present when it took place—and, on being asked where he lived at the time, answered that it was near the party—and it was proved that he did not live in the State at the time; it was held that this was not swearing to such a material fact as would constitute perjury, though false. *ibid*.

See *Commonwealth v. Knight*, 12 Mass. Rep. 274. *The State v. Hayward*, 1 Nott & M'Cord, 547. *The State v. Dodd*, 2 Murphey, 226, as to the manner of alleging in the indictment that the false swearing was in a point material to the issue.]

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scient if one or more *other* witnesses prove circumstances which tend to the proof of perjury; although it would, consistently with the general rule, be insufficient * for the same witness who gave direct evidence of the perjury, to prove those circumstances, for then the whole would still rest upon his sole testimony (1).

If any one distinct assignment of perjury be proved, the defendant ought to be convicted (q).

Corrupt intent.

Evidence is essential, not merely to show that the defendant swore falsely in fact, but also, as far as circumstances tend to such proof, to show that he did so corruptly and wilfully against his better knowledge. For it has been justly and humanely said, that a Jury ought not to convict where it is probable that the fact was owing rather to the *weakness* than the *perverseness* of the party; as where it was occasioned by surprize or inadvertency, or by a mistake of the true state of the question (r) (2).

Subornation.

On an indictment of subornation of perjury, it is said to have been held in Reilly's case, that the record of the conviction of Macdaniel, the person alleged to have been suborned, was not in itself sufficient evidence against the defendant to prove that Macdaniel had in fact committed perjury (s).

(q) *R. v. Rhodes*, 2 Ld. Raym. 886, 7. 2 Bl. Rep. 790.

(r) 1 Haw. c. 69. *R. v. Melling*, 5 Mod. 349. 10 Mod. 195.

(s) 1 Leach, 454. *Russel*, 1796. Macdaniel had been convicted of feloniously taking a false oath to obtain administration to the effects of a seaman, and the defendant was indicted for feloniously procuring Macdaniel to take the oath; the record of Macdaniel's conviction was produced and read; but it is stated that the Recorder obliged the counsel for the prosecution to go through the whole case to prove the guilt of Macdaniel. But although it would clearly be competent to the prisoner in such a case to controvert the guilt of the person suborned, notwithstanding the record, *qu.* whether the record be not *prima facie* evidence of the fact. If the prisoner, instead of being indicted as a principal in procuring, &c. had been indicted as an accessory before the fact, in procuring, &c. the record would clearly have been good *prima facie* evidence of the guilt of the principal. *Supra*, tit. *Accessory*.

(1) [On an indictment for perjury, two witnesses are not necessary to disprove the fact sworn to by the defendant; but where there is but one witness, some other evidence must be adduced in addition to his testimony. *The State v. Hayward*, 1 Nott & M'Cord, 547.]

(2) [It is perjury if one swears wilfully, absolutely and falsely to a matter which he believes, if he has no probable cause for believing: An oath is wilful, when taken with deliberation, and not through surprise or inadvertency, or a mistake of the true state of the question. *Commonwealth v. Cornish*, 6 Binney, 249.]

The defendant, although perjury be assigned on his * answer, affidavit, or deposition in writing, may prove that an explanation was afterwards given, qualifying or limiting the first answer.

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* 1146
Defence.

Where perjury was assigned on the answer of the defendant, in which she swore that she had received no money, in her defence she proved a second answer, in which she stated that she had received no money before such a day, the Court, on a trial at bar, held, that the second answer explained the first, and that perjury could not be assigned upon the first (t).

It is no objection to the competency of a witness that he has sworn to the same fact which he is called to prove (u); and if several be indicted for perjury as to the same fact, each is a competent witness for the rest previous to his conviction (x).

It was formerly held, that a person prejudiced by the perjury was not a competent witness to prove it (y); the rule, it has been seen, is now exploded (z).

It is said to have been held, upon a trial for perjury, alleged to have been committed on the trial of an ejectment, that what a witness then swore who is since dead, is admissible in evidence (a); this however seems to be utterly inconsistent with the principles now established (b).

PEW, see tit. *Prescription*.

* POLICY OF INSURANCE.

* 1147

THE proofs relate to, 1st, the effecting of the policy (c); 2ndly, the interest in the ship or goods (d); 3rdly, the in- Particulars of
ception of the risk, compliance with warranties, &c. (e); proof.
4thly, the legality of the voyage, &c. (f); 5thly, the loss, adjustment, &c. (g); 6thly, the recovery of premiums (h);

(t) *R. v. Carr*, on a trial at bar. Sid. 418. 2 Keb. 576.

(u) *R. v. Pepys*, Peake's C. 138.

(z) *Bath v. Montague*, cited Fortesc. 247. 2 Hale, 280. *R. v. Bray*, Sel. N. P. 1046. *Supra*, 762, 3.

(y) 1 Ld. Raym. 396. Skinn. 327.

(z) *Supra*, 771.

(a) *Taylor v. Brown*, T. Ray. 170, by two Justices against the opinion of Kelyng, C. J.

(b) *Supra*, Part II. sec. cl.

(c) *Infra*, 1147.

(d) 1149.

(e) 1160.

(f) 1163.

(g) 1164.

(h) 1173.

PART
IV.Policy, proof
of.

7thly, of matters in defence of the action, fraud (i), breach of warranty (k): lastly, the competency of witnesses (l).

- 1st. The Policy.—The policy must be produced, and proved, either by evidence of the defendant's signature, or that of his agent; and in the latter case the authority of the agent must also be proved (m), either by the direct evidence of the agent who is a competent witness for the purpose, or by proof of his hand-writing, and evidence that he is the general agent of the defendant for those purposes, or that he has been specially authorized in the particular instance. If a written authority has been given, it should be produced and proved (n). Proof of authority may also consist in showing that the defendant has, in other instances, recognized the authority of the agent to subscribe policies for him (o), by payment of losses due upon
- * 1148 * such policies, or that he has admitted the making of the policy in the particular instance, as by paying money into Court generally. Proof of subscription by an authorized agent will satisfy an allegation of signature by the defendant (p).

Where a material alteration has been made in a policy by consent of some of the underwriters, the plaintiff cannot recover against an underwriter who was ignorant of the alteration when it was made, although he afterwards assented to it (q).

(i) 1174.

(k) 1179.

(l) 1183.

(m) *Supra*, 55. This proof, although essential if required, is in practice seldom called for.

(n) *Supra*, 55, note (e). *Neale v. Erving*, 1 Esp. C. 61.

(o) *Supra*, 59. The authority to effect a policy may be presumed; as where a foreigner, after purchasing goods from B. at Bristol, directed his agent in London to effect an insurance, and B. not knowing that he had done so, effected an insurance by instructions from his clerk, and it was held, that the Jury did right in presuming that the clerk had authority. *Barlow v. Leckie*, 4 Moore, 8; *Grant v. Hill*, 4 Taunt. 380; *Bell v. Jutting*, 1 Moore, 159.

(p) *Nicholson v. Croft*, 2 Burr. 1188.

(q) *Campbell v. Christie*, 2 Starkie's C. 64. See the statute, 35 Geo. III. c. 63, s. 13. A mere extension of the time of sailing does not render a new stamp necessary. (See *Kensington v. Inglis*, 8 East, 273. *Hubbard v. Jackson*, 4 Taunt. 169. *Ridsdale v. Shedden*, 4 Camp. 107.) So a mistake may be rectified without a fresh stamp. (*Robinson v. Fouray*, 1 M. & S. 217. *Robinson v. Tobin*, 1 Starkie's C. 336.) But if the subject-matter of insurance be altered, a new stamp becomes requisite; as where an insurance on ship and goods is altered into an insurance on ship and outfit. (*Hill v. Patten*, 8 East, 373. *French v. Patton*, 9 East, 351. 1 Camp. 72.) otherwise, where the description only is altered, the

PART
IV.Construction
of the policy.

* 1149

Although, as has been seen, the technical terms of a policy may be interpreted according to their mercantile sense, yet the mere opinion of witnesses who have not had actual experience of the usage to that effect, is not admissible. Thus, where the terms were "at and from *L.* to *A.* with liberty to cruize, six weeks," it was held * that witnesses who had never known a case so circumstanced could not be admitted to state their opinion that the clause warranted a cruising of six weeks, taken at intervals (*r*).

2dly. The plaintiff's interest in the subject matter insured (*s*).

The same means of proving a title to a ship which existed previously to the passing of the Registry Acts still exist; the principal effect of those laws is to render further proof necessary in cases where the party relies on a title by transfer (*t*). Interest.

The actual possession of a ship by the party in whom the interest is alleged to be, and acts of ownership by him, are in this, as in other cases, presumptive evidence of title (*u*). Where the captain proved that he was appointed and employed by Robertson and Walker (in whom the interest was alleged to be), the proof was held to be sufficient, although it appeared upon cross-examination that the ownership was derived to those persons under a bill of sale, executed by the witness as the attorney of a former Ship.

subject-matter remaining the same. (*Sawtell v. Loudon*, 5 Taunt. 359. 1 Marsh. 99.) Where the insurance was altered by striking out the words "on ship," and inserting the words "on goods," as interest may appear, the assured having really no interest in the ship. Where a policy was executed in the printed form, without any specific subject of insurance being inserted in writing, and the subject-matter was afterwards added in writing, and subscribed by some of the underwriters only, it was held that the assured could not recover on the altered contract against the underwriters who had not signed the altered policy. *Langhorn v. Cologan*, 4 Taunt. 330. See *Park on Insur.* 7th edit. 46. *Forshaw v. Chabert*, 3 B. & B. 158.

(*r*) *Syera v. Bridge*, Doug. 537. *Supra*, 456; and tit. *Parol Evidence*, 1034.

(*s*) See the stat. 19 Geo. II. c. 37, s. 1, which makes insurances on any ships belonging to his Majesty, or any of his subjects, or any goods laden or to be laden on board such ships, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the insurer, void. The statute does not apply to foreign ships. *Thellusson v. Fletcher*, Doug. 315. *Nantes v. Thompson*, 2 East, 365. *Crauford v. Hunter*, 8 T. R. 13.

(*t*) *Infra*, 1150.

(*u*) *Abbott's Law of Shipping*, 72.

PART
IV.Proof of
interest.

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Proof of inter-
est in ship.—
Registry Acts.

transfer is made whilst the ship is *absent* from her port, so that an indorsement on the certificate cannot immediately be made, a sale may still be made by bill of sale, a copy of which is to be delivered to officers of the customs at the ship's port of registry, and an entry and memorandum of which are to be made as before directed (e); and a sale or contract will be void unless such indorsement be made within ten days next after the return of the ship to her port (f). In such case the * delivery of the grand bill of sale is equivalent to a delivery of the ship herself (g).

The property in a ship vests in the purchaser upon execution of the bill of sale, but is defeasible by neglect to comply with the Register Acts (h).

Where a time is fixed by the Legislature for the delivery of a copy of the bill of sale to the officer, the transfer will be absolutely void if the requisites of the statute be not complied with within the time (i); and where no time is prescribed, the property will not vest until those requi-

purchaser, took the ship to be repaired, and the ship-builder brought an action against the former owners for repairs; but it was held that they were not answerable, as the order was given by a mere stranger, and not for their benefit but his own. *Ibid.*

(e) By the stat. 26 Geo. III. c. 60, s. 16.

(f) 34 Geo. III. c. 68, s. 16. And by the same statute, s. 17, where the owner resides in a country not under the dominion of his Majesty, as a member of a British factory, or agent for or partner in any house carrying on trade, &c. in Great Britain or Ireland at the time of the transfer, so that an indorsement, &c. cannot be made immediately, the same may be done at any time within six months next after the transfer, and within ten days after the owner, or some agent legally authorized by him, shall arrive in this kingdom, if the ship be then there, or if not there within ten days after such arrival, such indorsement, &c. shall be made, the bill of sale or contract otherwise to be void.

By the stat. 13 Geo. III. c. 26, no sale to a foreigner shall be valid without the consent in writing of the part-owners of three fourths in value, to be indorsed on the certificate before two witnesses. Where the property is wholly transferred to a foreigner, the certificate is to be delivered up to the proper officer. (26 Geo. III. c. 60, s. 15.) and it seems that no new register is requisite on the transfer of the whole or part to a foreigner. (Abbott's L. S. 53.) Where the last of the ten days was a holiday at the Custom-house, and the indorsement was made, and the copy delivered on the next day of business, it was held that the transfer was void. *Gillespay v. Mestaer*—Cor. Ld. Ellenborough, sitt. after Trin. term, 1804. Abbott's L. S. 61.

(g) *Atkinson v. Maling*, 2 T. R. 462. [*Badlam v. Tucker & al.*, 1 Pick. 398.]

(h) Per Wood, B. *Hubbard v. Johnstone*, 3 Taunt. 177.

(i) Abbott's L. of S. 61.

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IV.Proof of interest in ship.—
Registry Acta.

sites have been complied with; and therefore the evidence of title arising from these documents is liable to be defeated by proof of a title in a third person, which intervened between the execution of the bill of sale and compliance, as for instance, where the bankruptcy of the vendor has intervened (*k*). Thus, where *R.* executed a bill of sale to *C.* of a vessel then at sea, but before the delivery of a copy to the officers of customs at the ship's port of * registry, became bankrupt, although this was done soon after the bankruptcy, and a regular indorsement made on the certificate, and notice thereof duly given within 10 days after the ship's return, the assignees were held to be entitled to the bankrupt's share (*l*).

* 1154

Where a ship is transferred to another port (*m*) the new register will not give validity to the bill of sale, unless the statutory requisites have been complied with. Thus, where *Ward*, the owner of a ship registered at Newcastle, but then in the Baltic, sold her to *Hubbard*, in London, who afterwards caused her to be registered *de novo* in London, on her arrival there, but sent no copy of the bill of sale to the officers of customs at Newcastle, it was held that the omission avoided the sale (*n*). So where a ship, registered in the port of Sunderland, was sold for value to a vendee in London, by a regular bill of sale, &c. the indorsement being regularly made on the certificate, but no copy of the bill of sale or indorsement was sent to the custom-house officers at Sunderland, but the vendees exhibited the bill of sale to the officers of the customs in London, and delivered up to them the certificate of registry, and obtained a new register, and the custom-house officers in Sunderland, upon notice from those in London, made an indorsement on the oath there, * purporting only, * 1155 that the ship had been registered anew in the port of London on the 9th of September 1805, it was held, that the

(*k*) *Abbott's L. of S.* 61.

(*l*) *Moss v. Charnock*, 2 East, 399. But it seems, that if the vendee had delivered a copy of the bill of sale to the officers before the bankruptcy, it would have been sufficient. (*Abbott's L. of S.* 62.) Where the omission is that of the public officer, and not of the individual, it will not invalidate a transfer of the property. *Heath v. Hubbard*, 4 East, 110. *Ratchford v. Meadows*, 3 Esp. C. 69. *Abbott's L. of S.* 67.

(*m*) *Supra*, 1152, note (*d*).

(*n*) *Heath v. Hubbard*, 4 East, 110. See also *Bloxam and others v. Hubbard*, 5 East, 407. Where it was held to make no differences whether the whole or part only of the ship was sold during her absence from her port of registry.

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Registry Acts.

assignees of the vendor, who became bankrupt on the 29th of the same month, were entitled to recover the value of the ship from the vendees (o).

The objects of the Registry Acts were aliene from those of evidence (p). A register is frequently essential to the communication of a title, and the want of it is in many instances conclusive to disprove a title, but in other respects the instrument is a mere private document, and it has no operation as evidence but that which it derives from the general principles of evidence. Proof of a registry of a ship in the name of one or more persons is no evidence for them to prove any interest in them (q), for it amounts to nothing more than their declarations (r).

- * 1156 * In the case of *Pirie v. Anderson* (t), the register alone was produced, and was held to be insufficient to prove the ownership of the parties. It was not proved that the parties had made an affidavit for the purpose; but such further proof would not, as it seems, have varied the case, for the evidence would still have rested in the mere assertion (although upon oath) of the parties themselves. Neither is the register in itself evidence to charge a man as part-owner, without evidence that it was made by his authority, or that he afterwards assented to it and adopted it (u).

(o) *Hayton v. Jackson*, 8 East, 511. The Court being of opinion that the 15th and 16th sections of the stat. 34 Geo. III. c. 68, were intended to embrace every case, whether the ship be in port or absent.

(p) The general object of the provisions thus briefly alluded to, was to restrict the commercial privileges formerly enjoyed by British owners of ships, wherever built, to British owners of ships built within the dominions of his Majesty.

(q) *Pirie v. Anderson*, 4 Taunt. 652. The affidavit on which the registry was made was not produced; the register purported to have been made on the oaths of the parties in whom the interest was alleged to be. On the objection being taken, evidence was adduced that *Cornfoot* was one of those persons, and being also master, had given instructions for preparing the bond in the names of those three persons.

(r) *Ibid.* And in *Flower v. Young*, 3 Camp. 240, the register was held to be no evidence, for the defendant in an action for stores supplied for the use of a ship, in order to prove a plea in abatement or the non-joinder of co-defendants, in order to show that those others were part-owners.

(t) 4 Taunt. 652.

(u) *Tinkler v. Walpole*, 14 East, 226. The defendant was charged as part-owner of the *Walpole East Indiaman*, for stores supplied to the ship. The plaintiff proved the execution of a bill of sale to the defendant, by the assignees of a bankrupt in a share of the ship, and a register, purporting to be made on the oath of a third person, that he and others, including the defendant, were the owners.

But although a register be no evidence to *prove* a transfer by sale, it is frequently conclusive to *negative* a transfer by sale.

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Where the interest was alleged to be in four, but two only were mentioned as owners in the register, it was held that the action could not be maintained, although in fact they were all partners in trade and had paid jointly for the ship (x). Where the defendant, who was sued as part-owner, for repairs done to a ship, relied on a previous transfer of his share, and proved a bill of sale of that share to a third person, in which it appeared that the certificate was not truly recited, it was held that no interest passed, and that the defendant was still liable (y).

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Registry Acts.

Where a ship was purchased in a foreign country, a copy of a bill of sale, issued by a public officer, authorized *by law to authenticate the original, and to make * 1157 copies, was admitted as evidence of the fact (z).

Where the interest is on goods, it may be proved by evidence of possession of the goods by the assured or his agent, and by acts of dominion and ownership. Interest in goods.

The ownership is also evidenced by bills of sale, bills of parcels, bills of lading, Custom-house clearances, &c. and such documentary evidence of this nature as can be procured ought to be produced in proof of the interest as alleged.

Where goods have been ordered by the assured, a delivery to an agent, or on board a ship, according to the directions of the latter, is a delivery to him (a).

The production of a bill of parcels from the seller abroad, with the receipt to it, and proof of his hand-writing, has been held to be sufficient proof of the interest of the assured (b).

Where a cargo has been consigned to the assured, the

(x) *Camden v. Anderson*, 5 T. R. 709.

(y) *Westerdell v. Dale*, 7 T. R. 306. See also *Dowson v. Leake*, 1 D. & R. 52; where it was held that a joint-owner of a ship, who had parted with his interest to the other joint-owner, but where the ship continued to be registered in their joint names as a collateral security, was liable for repairs, although he never interfered in the concerns of the vessel. Owners are liable for such repairs as a prudent owner would deem to be necessary. *Webster v. Seekamp*, 4 B. & A. 352.

(z) *Woodward v. Larking*, 3 Esp. C. 286.

(a) *Supra*, 638.

(b) *Russel v. Boheme*, 2 Str. 1127.

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goods.

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production of the bill of lading (c), with the testimony of the master, that he received the goods on board, is sufficient evidence of interest (d), but if the master be not called, it is necessary to prove that the goods specified in the bill of lading were received on board. Where the master is dead, the proof of his signature to a bill of lading, for the delivery of goods to the consignee, is evidence of an insurable interest of the latter in the goods (e). Where in such a case the master, who had signed the bill, had made a memorandum upon it, that *the contents of the boxes on board were unknown, it was held that the document did not prove an interest in the consignee (f). The nature of a bill of lading, and its legal operation in transferring property, has already been adverted to (g). If the bill direct a delivery to the consignor or his assigns, or to order or assigns, and be indorsed specially to a third person by name, or be indorsed generally, and be delivered to a third person, the property passes to the indorser or holder (h). And where the delivery is to be made to a consignee by name, the property is conveyed by a *bona fide* indorsement and delivery of the bill of lading by that consignee where it is intended so to operate, in the same manner as by a direct delivery of the goods themselves (i). So an indorsement of the bill of lading, and delivery of it by a factor, intrusted to sell the goods to a third person, to whom he has sold them, conveys the interest to the latter (k). Where the interest has vested by an indorsement and

(c) *Vide supra*, 308. Bills of lading for goods carried coastwise, require no stamp. (*Scotland v. Wilson*, 5 Taunt. 533.) By the stat. 48 Geo. III. c. 149, sch. part 1, bills of lading for goods, merchandize, or effects to be exported, require a 3s. stamp.

(d) Per Ld. Kenyon, *McAndrew v. Bell*, 1 Esp. C. 373. [& Mr. Day's note.]

(e) *Haddow v. Parry*, 3 Taunt. 303; *supra*, 308.

(f) *Haddow v. Parry*, 3 Taunt. 303.

(g) See Abbott's Law of Shipping, 392, where the nature and effect of these instruments is described. See also above, p. 308.

(h) *Supra*, 308. The property passes, by the indorsement and delivery of the bill of lading by the consignee, for a valuable consideration and without collusion, although the indorsee knew that the consignor had taken the consignee's acceptances, not yet due, in payment. *Cumming v. Brown*, 9 East, 506.

(i) Per Ld. Ellenborough in *Newson v. Thornton*, 6 East, 41, where a factor is intrusted to sell goods shipped by him, which by the bill of lading are to be delivered to order, or to assigns, and the factor indorses the bill of lading and delivers it to a third person.

(k) 6 East, 41. *Wright v. Campbell*, 4 Burr. 2047.

delivery of the bill of lading, the indorsement must be proved.

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The shipment of particular goods on board the ship may be proved by the master or any other person acquainted with the fact of delivery.

A bill of lading, signed by a deceased master of a * ship, * 1159 is evidence to prove the shipment of the goods specified in the bill of lading, as well as the interest of the consignee, even against themselves (l). A copy of an official report of the cargo of a ship, made under legislative authority by an officer of the customs, in whose custody the original is lodged, is, it seems, evidence to prove the shipment of the goods which it specifies (m).

A variance in the proof of the interest from the aver- Interest.
ment will be fatal. It is material that a disclosure of the true interest meant to be covered by the policy, should be made, not only in order to apprise the underwriter whose case he is to meet (n), but as a matter of public policy and convenience (o). Thus joint owners who have insured for their joint use, and on *their joint account*, cannot recover on a count in the policy, alleging the interest to be in one only (p).

* But it is sufficient to show that the party was interest- * 1160
ed when the risk commenced, although he was not inte- Variance.
rested when the policy was effected (q).

Where a policy, in the usual form, alleged the interest

(l) *Haddow v. Parry*, 3 Taunt. 305. See the principle, *supra*, Vol. I. p. 314.

(m) *Johnson v. Ward*, 6 Esp. C. 47, 8.

(n) In this, as in other actions or contracts, it is essential that the names of the contracting parties should be disclosed by the declaration, in order to apprise the defendant, whose case he is to meet, what admissions or declarations he may give in evidence, and in order that he may be enabled to object to a party's giving evidence as a witness against him, or sitting upon the Jury. See 5 Taunt. 108.

(o) Per Ld. Ellenborough, in giving judgment in *Bell v. Ansley*, 16 East, 141. And see the observations there made on the case of *Page v. Fry*, 2 B. & P. 240, where the objection was that *A.* and *B.* the purchasers of goods, admitted *C.* to a share in the concern; and the case was argued on the mere question, whether *A.* and *B.* were properly averred to be interested, without reference to the averment, that the policy was made for their use and on their account. See the case of *Hiscox v. Barrett*, Cor. Lee, C. J. Guildhall, Dec. 1747, cited 16 East, 143. See also *Cohen v. Hannam*, 5 Taunt. 101. *Carruthers v. Sheddon*, 6 Taunt. 14. *Perchard v. Whitmore*, 2 B. & P. 155, n.

(p) *Bell v. Ansley*, 16 East, 141.

(q) 2 Taunt. 237.

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the 26th of July, and the declaration alleged that she would have sailed on that day, if she had not been restrained by the orders and command of the governor of Jamaica, and detained beyond that day; it was held, that the warranty being absolute and express, must be complied with (e).

- * 1163 * Where the declaration avers that the ship sailed after the making of the policy, although it appear that in fact she sailed before, the variance will not be material (f).

Legality.

4thly. At common law, a license to trade with the enemy could not be granted but under the great seal. By the stat. 48 Geo. 3. c. 126, upon an order in council being made for that purpose, the secretary of state was authorized to grant such licenses. The same statute directs that a duplicate of the order in council shall be annexed to the license.

License.

Where the original is in existence it ought to be produced, as being the best evidence. If it has been lost, after evidence of the loss, proof should be given of an examined copy of the order in the council-book, and of the license remaining in the secretary of state's office (g). Where a license granted under the king's sign manual has been lost, evidence should be given of an examined copy of it from the proper register (h).

- Where a license, granted by the governor of a foreign colony, has been lost, parol evidence of its contents is admissible (i). Where a license to import certain specified articles had been burnt at the Custom-house, after proof that the Custom-house would not permit an entry to be made without an indorsement of the time of clearance upon it, in conformity with the order of council, it was presumed that such an indorsement had been made upon it (k). Where the insured vessel was warranted to carry a French license, it was held to be insufficient to show that the captain, before the * ship sailed from Dantzic, received a document, purporting to be a French license, without showing that he received it from some person in authority under the French government, but proof that after the arrival of the vessel at Bordeaux she remained there a month
- * 1164

(e) *Hore v. Whitmore*, Cowp. 784. [Phillips on Insurance, chap. ix. sect. 3.]

(f) *Peppin v. Solomons*, 5 T. R. 496.

(g) *Eyre v. Palsgrave*, 2 Camp. 605. *Rhind v. Wilkinson*, 2 Taunt. 237.

(h) *Rhind v. Wilkinson*, 2 Taunt. 237.

(i) *Kensington v. Inglis*, 8 East, 273.

(k) *Butler v. Alnutt*, 1 Starkie's C. 222.

after the inspection of the French license, and other documents, by the officers of the French government, was held to afford *prima facie* evidence that the document was genuine (l).

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License.

Where a license had been granted to *A.* and *B.* by name, for permitting vessels bearing any flag, to import certain specified articles, it was held to be sufficient in proof, to show that the license had been applied to the ship and voyage in question, without further connecting the plaintiff with *A.* & *B.* to whom the license had been granted (m).

5thly. Whether the loss proved satisfy the averment is of course a question for the Court. The general rule upon the subject is, that the loss must be a direct and immediate consequence of the peril insured against and averred upon the record, and not a remote consequence (n). Thus in the case of an insurance against the perils of the seas, every accident which happens by the violence of the wind or waves, by thunder and lightning, by driving against rocks, by the stranding of the ship, may be considered to be a loss within the meaning of the policy (o); but if a ship be driven by * stress of weather on an enemy's coast, and be there captured, it is a loss by capture, and not by perils of the seas (p). To constitute a stranding, it is essential that the

Proof of loss.

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(l) *Everth v. Tunno*, 1 Starkie's C. 504.

(m) *Butler v. Alnutt*, 1 Starkie's C. 222. A condition that the merchant-exporter shall give security is not satisfied by a security given by his vendee. *Camelo v. Britten*, 4 B. & A. 184.

(n) *Park on Insurance*, 97. 102. 262. An averment of seizure by enemies unknown is not supported by proof of a seizure by the government of the country, on the ground of illegal importation. *Matthie v. Potts*, 3 B. & P. 23.

(o) *Park*, 102. 1 Show. 323. Where a merchant ship was by mistake taken in tow by a British ship of war, and thereby exposed to a tempestuous sea, which injured goods on board her, it was held to be a loss by perils of the sea; but *semble*, it might have been alleged to be a loss by capture. *Hagedorn v. Whitmore*, 1 Starkie's C. 157.

(p) *Green v. Elmslie*, Peake's C. 212. An underwriter is liable for a loss sustained immediately from the perils of the sea, but remotely from the negligence of the master and mariners. *Walker v. Maitland*, 5 B. & A. 171; and see *Busk v. Royal Exchange Assurance Company*, 2 B. & A. 73. Death of cattle by rolling of the ship is a loss by perils of the sea. *Lawrence v. Aberdeen*, 5 B. & A. 107. If a ship be blown over on her side and be damaged whilst she is in the graving dock, the underwriter is liable, but it is not a loss by perils of the sea. *Philips v. Barber*, 5 B. & A. 561. So the underwriter is liable in respect of loss in removing the goods from the ship to the place of landing, where it is done in the usual course of the voyage, although not mentioned in the policy. *Stew-*

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IV.

Proof of loss.

Presumptive evidence.

ship striking upon a rock, &c. should have been stationary for some time (*q*). An averment of loss by perils of the seas is not supported by proof that the vessel was sunk in consequence of being fired upon by another vessel under a mistake (*r*).

Where a ship has sailed, and no intelligence has been received of her within a reasonable time afterwards, a presumption arises that she is lost (*s*). Where the insurance was on a voyage from North Carolina to London, with a warranty against captures and seizures, and the loss averred to be by sinking at sea, all the evidence was that she had sailed on her intended voyage, and had never since been heard of. Some witnesses proved, that in such cases the presumption is that the ship has perished at sea, all other losses being usually heard of. It was insisted, for the defendant, that as captures and seizures were excepted, it lay on the plaintiff to prove that the loss happened as averred; but Lee, C. J. said, that it would be unreasonable to expect certain evidence of such a loss, where all on board were presumed to be drowned, and the cause was left to the Jury, who found for the plaintiff (*t*). In such cases, it is proper to be provided with evidence of such collateral circumstances as tend to support the presumption, as, that other vessels which * sailed at the same time did actually arrive (*u*), the usual length of the voyage, the difficulty of navigation, the prevalence of tempestuous weather, likely to occasion danger.

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The question of lost or not lost being one of fact, is of course for the consideration of the Jury, no general rule having been laid down fixing any time after the sailing of the ship, at the expiration of which the assured is entitled to receive the amount of the loss from the underwriter (*x*);

art v. Bell, 5 B. & A. 238. The sale of part of a cargo for the purpose of making a refitment is not a loss by perils of the sea. *Powell v. Gudgeon*, 5 M. & S. 431.

(*q*) *Baker v. Toury*, 1 Starkie's C. 436. *Macdougale v. Royal Exchange Assurance Company*, *ibid.* 130. [4 Camp. 283. S. C.] See also *Rayner v. Gadmond*, 5 B. & A. 225. *Carruthers v. Sydebotham*, 4 M. & S. 77. *Hearne v. Edmunds*, 1 B. & B. 388. [See Phillips on Insurance, 484.]

(*r*) *Cullen v. Buller*, 1 Starkie's C. 138. [4 Camp. 289. 5 M. & S. 461. S. C.]

(*s*) Park, 105.

(*t*) *Green v. Brown*, 2 Str. 1199.

(*u*) *Newby v. Read*, *Sittings after Mich.* 3 Geo. III. Park on Ins. 106.

(*x*) Park on Ins. 107.

nor indeed would a very general rule be practicable, so much must depend upon the particular circumstances of each individual case (y).

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A foreign sentence of condemnation (z) is not evidence to prove a capture, until a foundation has been laid for it by proof of a capture in fact; after such proof, the sentence is evidence to show the grounds of condemnation (a). The books at Lloyd's are evidence of a capture, but they are not in themselves evidence of notice of the loss to the underwriter (b), where by the terms of the policy the loss is to be adjusted within a specified time after notice, but they supply such evidence of the fact of notice, as, coupled with other circumstances, may be sufficient to go to the Jury (c).

Loss.
Capture.

* Proof that the person who acted as master of the ship carried her out of her course for fraudulent purposes of his own, is *prima facie* evidence of barratry, without negative proof that the person so acting as master was not the owner. It lies on the underwriter to prove in his own discharge that he was the owner (d).

* 1167
Barratry.

In order to recover for a total instead of a partial loss, the plaintiff must prove his notice of abandonment to the defendant (e). Such notice will be insufficient for the purpose of recovering a total instead of a partial loss, if it

Loss, amount
of.

(y) In Spain and France, however, rules have been laid down upon the subject. *Ibid*.

(z) As to the proof of a foreign sentence, *vide supra*.

(a) *Marshall v. Parker*, 2 Camp. 69.

(b) *Abel v. Potts*, 3 Esp. C. 242. [and Mr. Day's note.]

(c) *Ibid*. Where, in addition, it was proved that the loss was publicly known,—that the defendant was a subscriber to Lloyd's, and in the daily habit of examining the books, and the broker swore to his belief that the defendant had had notice.

(d) *Ross v. Hunter*, 4 T. R. 33. Park on Ins. 154.

(e) Park on Ins. 186. 228. An abandonment must be made before satisfaction can be demanded, *ibid*. It must be total, not partial, *ibid*. The insured may always elect not to abandon, but he cannot at his own option convert a partial into a total loss (2 Burr. 697); nor can he abandon, unless at one period or other of the voyage there has been a total loss (*Cazalet v. St. Barbe*, 1 T. R. 187. *Furneaux v. Bradley*, Easter, 20 Geo. I. Park on Ins. 257. *Da Costa v. Firth*, 4 Burr. 1966. *Anderson v. Wallis*, 2 M. & S. 240,) that is, when the object of the insured is so far defeated by a peril in the policy that it is not worth his while to pursue it, or if the salvage be very high, or amounting to one half (*semble*) or if further expense be necessary, and the insurer will not engage to pay that expense at all events, although it should exceed the value, or fail of success. 2 Burr. 1209. Park on Ins. 231. [See *Gordon v. Mass. Fire and Marine Ins. Company*, 2 Pick. 249.]

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IV.

Loss.

* 1168
Amount of
loss.

appear that the assured has not made his election, and given his notice of abandonment speedily, and in the first instance, as soon as he has heard of the loss (*f*), or at the earliest opportunity after he has examined into the state of the cargo (*g*).

* A payment into Court of a per-centage on a valued policy does not admit a total loss (*h*).

The plaintiff may recover for a partial, although he declare for a total, loss (*i*), but if he declare on a total loss by capture, and it appear that the ship was re-captured, he cannot recover the amount of the loss sustained by salvage, unless he prove the proceedings in the Admiralty Court under seal (*k*), for his claim depends upon the judgment of the Admiralty Court (*l*). But the amount of salvage may, it seems be recovered, although it be not specifically alleged as a loss in the declaration (*m*).

An adjustment is proved by evidence of the signature of the underwriter, or his agent, with proof of the authority of the latter (*n*). It is, it seems, to be presumed, that an agent who has authority to subscribe a policy, has also authority to sign an adjustment of loss (*o*).

The legal operation and effect of an adjustment in evidence, seems, (although some contrariety of opinion has been expressed on the subject (*p*),) to depend upon settled and established principles. An adjustment is nothing more than a written admission of the

(*f*) In order to put the underwriter in a situation to do all that is necessary for the preservation of the property, whether sold or unsold. *Mitchell v. Edie*, 1 T. R. 608. *Allwood v. Henckell*, Guildhall, after Mich. 1795.—Park on Ins. 280.

(*g*) *Martin v. Crockatt*, 14 East, 465. *Gernon v. Royal Exchange Assurance*, 2 Marsh. 88. 6 Taunt. 383. *Aldridge v. Bell*, 1 Starkie's C. 498. See *Reed v. Bonham*, 3 B. & B. 147: Sale of a ship at Calcutta, the captain arrived April 25; the ship's papers arrived May 5th, and notice given on the 5th, without communication with the underwriters, was held to be sufficient.

(*h*) *Rucker v. Palsgrave*, 1 Taunt. 419.

(*i*) *Gardiner v. Croasdale*, 2 Burr. 904. B. N. P. 129.

(*k*) *Thellusson & others v. Shedden*, 2 N. R. 228.

(*l*) The stat. 43 Geo. III. c. 160, s. 40, directs, that in all cases of capture and re-capture the amount of salvage shall be ascertained in the Admiralty Court.

(*m*) *Cary v. King*, R. T. Hardw. 304. Park on Ins. 613.

(*n*) *Supra*.

(*o*) Per Ld. Ellenborough in *Richardson v. Anderson*, 1 Camp. 43, n.

(*p*) Park on Ins. C. 6.

amount of the loss as settled between the parties, and indorsed upon the policy, after which acknowledgment, *time is usually given (*q*), (which is sometimes stated in the indorsement accordingly) to the insurer to pay that amount. The effect there, as in other cases of admission, seems to be simply this, to relieve the plaintiff from proving his case in detail, and to enable him to recover the adjusted amount without further proof (*r*), according to the general principles already announced (*s*), and the practice in analogous cases (*t*).

It appears, that in the case of *De Garron v. Galbraith* (*u*), the plaintiff gave no other evidence than the adjustment, and that the witness who proved it swore that doubts, soon after they had signed it, arose in the minds of the underwriters, and they refused to pay; upon which Lord Kenyon held that the plaintiffs must go into other evidence, and in default of other evidence nonsuited them, and the Court of King's Bench afterwards refused to set aside the nonsuit. Notwithstanding this high authority, it is difficult to reconcile this case with general principles. Upon all the decisions, as well as upon principle, the adjustment was *prima facie* evidence to establish the claim. It seems then to be difficult to say, upon what ground the existence of the subsequent doubts in the minds of the underwriters could be evidence at all *against the plaintiff, and still more so, to say that such doubts, although communicated to the plaintiff, could do away the effect of a previous deliberate admission; if this were so, it would furnish a summary mode of getting rid of the most solemn admissions in all cases. The refusal to pay the amount was nothing more than what necessarily occurs whenever an action is brought after an adjustment. The *prima facie* admission stood, as it seems, uncontradicted; and at all events, and even assuming that the subsequent doubts could in any

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(*q*) A month it seems is the time usually allowed. *Jell v. Pratt*, 2 Starkie's C. 67.

(*r*) As it seems on the *indebitatus* count, for unless there be some admission that the loss happened as averred in the special Count, there would be a difficulty in applying the general admission to that count. See *Hogg v. Goldney*, Sittings after Trin. 1745, Cor. Lee, L. C. J. Beawes Lex. Merc. 310. Park on Ins. 193. *Rogers v. Mayor*, Sittings after Trin. 1790. Ibid. 194. *Christian v. Coombe*, 2 Esp. C. 489.

(*s*) *Supra*, 123.

(*t*) As in the case of a bill of exchange, *supra*, 272. So in cases of bankruptcy, 165.

(*u*) Sittings after Mich. Term, 1795. Park on Ins. 194.

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IV.Effect of an
Adjustment.

way qualify that admission, the effect of it was rather a matter for the consideration of the Jury, than a ground of nonsuit. The report, however, of this case is very short; and it may be collected from the statement made by the learned author of the work from which the case is cited, (who was counsel in the cause) that the doubts were *communicated* (x) by the defendant to the plaintiff *immediately* after they had signed the adjustment. A mere subsequent communication, notifying the intention of the party, could not, it should seem, deprive the plaintiff of the benefit of his *prima facie* evidence; its effect would rather be, as in the case of a bill of exchange, to estop him from saying that he had been taken by surprise, when evidence was offered by the defendant, notwithstanding the adjustment, to disprove his liability. If indeed the communication could be considered as a contemporaneous transaction, and part of the *res gesta*, then, as the whole of the circumstances accompanying the adjustment must be taken together, the effect might be to show that the adjustment was not an absolute one, but subject to the removal of the doubts so expressed (y).

- * 1171 * This view of the case seems however to be inconsistent with the observations made by Lord Kenyon on refusing the motion for a new trial (z).

In the case of *Hogg v. Goldney* (a), Lee, C. J. said, an adjustment on a policy, by which the defendant agreed to pay the adjusted amount a month after date, was to be considered as a note of hand, and that the plaintiff had no occasion to enter into proof of the loss (b).

(z) And see *Ld. Kenyon's* observations on refusing the rule for a new trial, *infra*, note (z).

(y) Especially as in such a case one *indicium* of the intent of the party to be bound, which exists in the case of a bill of exchange or other security, viz. the delivery of it to the plaintiff, would be wanting, for the policy would at all events be in the plaintiff's possession.

(z) He said, "I admit the adjustment to be evidence in the cause to a certain extent; but I thought at the trial, and still think, that where the same witness who proved the signature of the defendant to the adjustment, said, that doubts, *soon after* the adjustment took place, arose in the minds of the underwriters as to the honesty of the transaction, and they called for further proof, the plaintiff should have produced other evidence; and that shutting the door against inquiry after an adjustment, would be putting a stop to candour and fair dealing amongst the underwriters."

(a) *Beawes*, Lex. Merc. 310. *Park on Ins.* 193.

(b) See the remarks on the observations in *Mr. Park's Law of Ins.* 194, & *sequent*.

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Adjustment.

It is clear, on the other hand, that an adjustment is but presumptive and *prima facie* evidence, liable to be rebutted by proof on the part of the defendant, repelling the plaintiff's claim to recover. The signing the adjustment creates no new debt, even assuming time to have been given; for a promise to pay in consideration of forbearance to sue, where there is no legal right to sue, is a mere *nudum pactum* (c). It would also be contrary to the plainest principles of justice and sound policy, that a party should be *estopped by a mere gratuitous promise, from showing the real merits of the case (d). Consistently with these principles, it may be shown that no debt existed; or the presumption arising from the admission may be rebutted by proof that it was obtained by fraudulent practices. An underwriter, after admitting his liability, must indeed make a strong case; but an adjustment is a mere admission, without any consideration to support it, except the defendant's liability on the policy; and until he has paid the money he is at liberty to avail himself of any defence which the law or facts of the case will furnish (e). Thus in the case of *Herbert v. Champion* (f), the defendant was admitted to prove in defence, that a letter from the captain to the insurer, containing intelligence as to the sailing of the ship, had not been communicated to the insurer previous to the insurance, although the defendant had read the letter previous to the adjustment. In the case of *Shepherd v. Chewter* (g) Lord Ellenborough informed the Jury that the adjustment did not bind the de-

(c) See *Barber v. Fox*, 2 Saund. 136. *Loyd v. Lee*, 1 Str. 94. *Tooley v. Windham*, Cro. Eliz. 206. 3 B. & P. 249, note (a). *Rann v. Hughes*, 7 T. R. 350. n.

(d) See Ld. Kenyon's observations in *De Garron v. Galbraith*, Park on Ins. 194. *Supra*, 1169. See also the principles, *supra*, ib.

(e) Per Ld. Ellenborough in *Herbert v. Champion*, 1 Camp. 134.

(f) *Ibid.* Park on Ins. 196. The plaintiff in that case had a verdict, the Jury deeming the letter to be immaterial.

(g) 1 Camp. 274. In that case the policy seems to have been discharged by the deviation of the ship; but evidence was offered on the part of the plaintiff, to prove the defendant's knowledge of that fact previously to the adjustment; and Lord Ellenborough left it as a question to the Jury upon the evidence, whether in fact the defendant, when he adjusted, knew of the deviation. The Jury found for the defendant; the question did not arise, whether an adjustment, with knowledge that the policy had actually been discharged, would revive it. Upon the principles already adverted to, it seems to be clear that it would not.

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IV.

endant, unless there was a full disclosure of the circumstances of the case (1).

* 1173
Money paid by
the insurer.

* It is a general rule, founded upon principles of policy and convenience, that money paid with a knowledge of the facts cannot be recovered, although the party paid the money under a mistake as to his legal liability (h). But money paid even after an adjustment, and after the name of the underwriter has been struck off both the policy and the adjustment, may be recovered by the insurer, if it was paid under a mistake in fact (i), or on proof of fraud (k).

To recover
premium.

The usual acknowledgment in the policy of the receipt of the premium by the underwriter from the broker, is conclusive evidence of the fact in an action by the assured to recover the premium (l) (2). The premium may be recovered where the insurance was effected under a reasonable expectation that a license would be procured * to legalize the voyage, although no license has been in fact procured, and the voyage was in consequence illegal (m).

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After an abandonment, and the payment as for a total loss, if there was in fact a total loss at the time of adjustment, although it afterwards turn out that the loss was but

(h) *Bilbie v. Lumley*, 2 East, 469. *Supra*, 112.

(i) *Ibid.* And see *Park on Ins.* 197.

(k) *Per Ld. Ellenborough in Bilbie v. Lumley*, 2 East, 469.

(l) *Dalzell v. Mair*, 1 Camp. 532. *Ld. Ellenborough* in that case observed, "If a man acknowledges that he has received a sum of money from a broker, and accredits him with his principal to that amount, he shall not afterwards, as between himself and the principal, be allowed to say that the broker never paid him. It is well known that there are running accounts kept between the insurance broker and the underwriter; and *Ld. Kenyon* held, that the former, before paying premiums to the latter, might maintain an action against the assured to recover the amount of them as for money paid." This doctrine rests, it seems, upon the peculiar situation of the parties in the case of an insurance through the medium of a broker, for otherwise a mere receipt is not conclusive evidence, as between the parties, of the payment of the money. *Supra*, tit. *Parol Evidence*; & *infra*, tit. *Receipt*.

It follows, from the above decision, that the underwriter cannot maintain an action against the assured for premiums. But he may recover against the broker for premiums. *Park on Ins.* 39. *Edgar v. Fowler*, 3 East. 222.

(m) *Hentig v. Stamford*, 1 Starkie's C. 254; [4 Camp. 270.] 5 M. & S. 122.

(1) [The doctrine on the subject of *Adjustment*, as held by the American courts, will be found in *Mr. Phillips's Treatise on Insurance*, chap. xx.]

(2) [See *Phillips on Insurance*, 76-79.]

partial, the insurer cannot afterwards recover the money so paid, but he stands in the place of the insured as to any benefit to be derived from salvage (n).

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The defendant may, under the general issue, adduce evidence to avoid the policy on the ground of fraud. The legal presumption in favour of innocence in this, as well as in all other cases, renders full and satisfactory proof necessary (p). In contracts of this nature, where the highest degree of good faith is requisite, either the assertion of that which is false, or the concealment of that which is true, and which in the least degree affects the nature of the risk, will vitiate the contract (q). Where the contract is made through the medium of a broker, the rule is that the broker must communicate whatever is in the special knowledge of the assured, but he is not bound to communicate * matters which are, as it were, in the middle between the assured and the underwriter; he is not bound to make a laborious disclosure of what is known to all (r). It is sufficient if the assured communicate all facts within their knowledge; they are not bound to state any opinion or conclusion founded upon those facts (s).

Defence.
Fraud.

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Suppression of
material facts.

Some difference of opinion has been entertained upon the question, whether the judgment of persons conversant with the business of insuring is admissible to show that a knowledge of the facts not communicated would have enhanced the premium. Where the assured resided in Jersey, from which their ship sailed on the 6th, and rumours prevailed in Jersey from that day up to the 16th (when the letter, directing the insurance was dated), that a capture had been made on the 7th, which rumours were not com-

(n) *Dacosta v. Firth*, 4 Burr. 1966. Note, that in that case there was an agreement that the insurers should be content with salvage in such proportion as the sum insured bore to the whole interest.

(p) *Park on Ins.* 325. Fraud in this, as well as in all other cases, may be proved by means of circumstantial evidence; direct and positive proof is in such instances seldom attainable.

(q) See *De Costa v. Scandret*, 2 P. Wms. 170. *Seaman v. Fonezeas*, 2 Str. 1183. *Beckthwaite v. Nalgrove*, cited, 3 Taunt. 41. *Lynch v. Dunaford* 14 East, 495. *Sawtell v. Loudon*, 5 Taunt. 363. *Gladstone v. King*, 1 M. & S. 35. *Bufe v. Turner* 2 Marsh. 46. 6 Taunt. 338.

(r) Per Lord Ellenborough in *Vallance v. Dewar*, 1 Camp. 503. See *Kingston v. Knibbs*, 1 Camp. 508. n. *Syers v. Bridge*, Doug. 527. *Pelly v. Royal Exchange Assurance*, 1 Burr. 341: *Hoskins v. Pickersgill*, Marsh. 727.

(s) *Bell v. Bell*, 2 Camp. 475. [See Phillips on Insurance, 103, & seq.]

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material facts.

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municated to the underwriters, witnesses were allowed to prove, that if the facts had been communicated to them they would not have engaged in the risk (t). Gibbs, C. J. in summing up to the Jury, observed, "It is the province of the Jury, not of individual underwriters, to decide what facts ought to be communicated. It is not a question of science, on which scientific men will mostly think alike, but a question of opinion, liable to be governed by fancy, and in which the diversity might *be endless. Such evidence leads to nothing satisfactory, and ought on that ground to be rejected (u)."

(t) The question whether they would have engaged in the risk, appears clearly to have been objectionable. See *Berthon v. Loughman*, 2 Starkie's C. 258.

(u) *Durrell v. Bederly*, Holt's C. 283. In the case of *Boehm v. Carter*, 3 Burr. 1905, the broker, on cross-examination by the defendant, said that he did not believe that the defendant would have meddled with the insurance if he had seen two letters, alluding to two letters which had been written by the party whose property had been insured in the plaintiff's name, in which he specified certain facts which ought, as was contended by the defendant, to have been communicated to the underwriter. Lord Mansfield in discharging the rule which had been obtained for a new trial, said, "that as to the opinion of the broker, it was mere opinion to which the Jury ought not to pay the least regard; that it was not evidence; it was an opinion after the event, without the least foundation from any previous precedent or usage, and which, if rightly formed, could only be drawn from the same proceeding from which the Court and Jury decided the cause." In this case it is observable that the evidence of the broker was mere opinion, as to the probable conduct of the principal under circumstances which never happened, and was not given as the result of his judgment upon the value of the indemnity, as upon a matter of calculation and of science.

Upon the general question, whether a witness may be asked, whether, in his judgment the risk would be increased, and consequently the value of the indemnity enhanced, by particular circumstances, it is to be observed, that the price and value must usually be a matter of calculation, depending upon the probability of loss, and calculated upon the average number of losses; and it is a combined matter of skill and experience to ascertain what circumstances ought to be taken into the account, for the purpose of estimating the probability of loss, and the value of an insurance, under particular circumstances, estimated upon an average. It is therefore difficult to say that the question of value, in such a case, is not one which requires the judgment of experienced and skilful persons.

In order to prove that the ship was not seaworthy when she sailed, ship-builders are competent to give their opinion on the facts detailed by others, (1 Camp. 117,) and yet the Jury may frequently be better judges of the state and condition of the vessel than they would be of the real value of a policy. It is true, that a Jury of merchants at Guildhall, skilful, intelligent, and acute and experi-

* In a later case (x), where the defence was, that material information, as to the time when the ship sailed had been withheld from the underwriter, and the letter upon which the insurance had been effected was given in evidence, Holroyd, J. held that a witness conversant in the subject of insurance might give his opinion as a matter of judgment, whether particular facts, if disclosed, would make a difference as to the amount of the premium. The premium had been considered as calculated upon an ordinary risk, and the question was not what the private opinion of the individual might be in the particular case, but what in his judgment the general opinion would be amongst those conversant in such matters.

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Suppression of
material facts.

Whenever the fixing the fair price and value upon a contract to insure is a matter of skill and judgment, acting according to certain general rules and principles of calculation, applied to the particular circumstances of each individual case, it seems to be matter of evidence to show whether the fact suppressed would have been noticed as a term in the particular calculation. It would not be difficult to propound instances in which the materiality of the fact withheld would be a question of pure science; in other instances, it is very possible that mere common sense, independent of any peculiar skill or experience, would be sufficient to comprehend that the disclosure was material, and its suppression fraudulent, although not to understand to what extent the risk was increased by that fact. In intermediate cases, it seems to be difficult in principle wholly to exclude the evidence, although * its importance may * 1178 vary exceedingly according to circumstances. It is observable, that in the two cases above cited (y), the evidence was in fact admitted, although strong remarks were made upon its operation.

The practice has* obtained, of admitting, in actions against an underwriter, evidence of representations made by the assured to the first underwriter, upon a presump-

enced as they are in such matters, would in all probability be as competent to form an opinion on such matters as the witnesses themselves; but it is to be recollected, that the question is as to the general admissibility of such evidence, and it may frequently happen that a Jury is composed of persons very incompetent to form a correct judgment of their own in such matters.

(x) *Berthon v. Loughman*, 2 Starkie's C. 258.

(y) *Boehm v. Carter*, 3 Burr. 1905. *Durrell v. Bederly*, Holt's C. 283.

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tion, as it seems, that the defendant acted upon the faith of the representation so made (y).

In the case of *Marsden v. Reid* (z), the Court intimated an opinion, that wherever a material fact had been represented to the first underwriter to induce him to subscribe the policy, it should be taken to have been made to all the rest without the necessity of repeating it. The rule however seems to have been confined to such representations as have been made to the first underwriter (a); and notwithstanding the practice which has obtained, the soundness of the doctrine has been questioned, and if it be still allowed to prevail, it must, it seems, be taken with considerable qualification (b) (1).

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Breach of
warranty.

* The order in which the signatures appear, as subscribed to the policy, is evidence that the contracts were made with the underwriters in that order (c). The defendant is also at liberty, under the general issue, not only to negative, by evidence, the performance of such express conditions and warranties as are precedent to the plaintiff's title to damages, the burthen of proving which, by *prima facie* evidence at least, lies on the plaintiff; but he may also show that the plaintiff has not performed those conditions

(y) 3 East, 573. *Passon v. Watson*, Cowp. 789. *Stackpole v. Simon*, Park. 648.

(z) 3 East, 573.

(a) Ibid.

(b) Upon this doctrine, Ld. Ellenborough, in the case of *Forrester v. Pigou*, 1 M. & S. 9, observed as follows, "Whenever the question comes distinctly before the Court, whether a communication to the first underwriter is virtually a notice to all, I shall not scruple to remark that that proposition is to be received with great qualification. It may depend upon the time and circumstances under which that communication was made; but on the mere naked unaccompanied fact of one name standing first upon the policy, I should not hold that a communication to him was virtually made to all the subsequent underwriters; but the question is of such magnitude, that if it should arise, I should direct it to be put upon the record, in order that it might be submitted to the consideration of all the Judges."

(c) *Marsden v. Reid*, 3 East, 572; and it was there held, that a slip of paper made at the time when the different assurers subscribed their policy, and containing their names in the order in which they actually subscribed, was not admissible in evidence without a stamp, the evidence tending to show that the contract entered into was different from that which appeared on the face of the contract itself.

(1) [A representation to an underwriter on one policy is held not to be such to an underwriter on another policy on the same property and against the same risks. *Elting v. Scott*, 2 Johns. 157.]

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which the law implies (o). Thus he may show that the ship was not seaworthy at the time when she sailed. The testimony of experienced and skilful persons is admissible for this purpose, although they form their judgment upon observations detailed by others (d). If the incompetency of the ship occurs at an early period of the voyage, a presumption naturally arises that the cause existed previously to the time of sailing (e).

The defendant even, as it seems (f), where there has been no express warranty to that effect, may show in defence that the vessel insured has not been furnished * with proper documents, or navigated according to the laws of the country to which she belongs, and to which she sails. * 1180

It has been held at *Nisi Prius*, that a representation made by the broker at the time when the names of the underwriters are put down upon a slip, is binding upon the assured, unless it be qualified or withdrawn before the execution of the policy (g). But where a ship, at the time of subscribing the slip, was represented to be American, but at the time of subscribing the policy the goods were insured on board the ship *Hermon*, and she was not represented to be of any particular country or place, it was held, that although she was in fact an American, it was not necessary that she should be documented as such (h). Such a representation however cannot, it should seem, on general principles, be admissible, as adding terms to the written contract, and therefore if available at all, must be so on the ground of fraud; and in that view of the case it seems to be immaterial whether the representation was made before or at the time of effecting the policy.

Evidence, that at the time of the capture the ship's pa-

(o) Liberty to call at any of the Leeward Islands to discharge, exchange, or take on board all or any part of the cargo without being deemed a deviation, does not warrant a calling there to obtain information as to the state of the market with reference to a new voyage. *Hammond v. Reid*, 4 B. & A. 72. See also *Selby v. Whitmore*, 5 B. & A. 45. *Rucker v. Allnutt*, 15 East, 278. *Langhorne v. Allnutt*, 4 Taunt. 511.

(d) *Beckwith v. Sydebotham*, 1 Camp. 117.

(e) See *Watson v. Clark*, 1 Dow, 336.

(f) *Christie v. Secretan*, 8 T. R. 192. *Law v. Hollingsworth*, 7 T. R. 160. *Farmer v. Legg*, ib. 186. *Bell v. Carstairs*, 14 East, 374. But see the observations of Lawrence, J. 8 T. R. 197. And see *Dawson v. Atty*, 7 East, 367. As to a condemnation for carrying simulated papers, see *Horneyer v. Lushington*, 15 East, 46. *Oswell v. Vigne*, 15 East, 70. *Bell v. Bromfield*, 15 East, 364. *Steele v. Lacy*, 3 Taunt. 285.

(g) *Edwards v. Footner*, 1 Camp. 530. Park on Ins. 531.

(h) *Dawson v. Atty*, 7 East, 367.

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pers were thrown overboard, affords a presumption that the ship was not neutral (i).

Upon principles already adverted to (k), sentences of condemnation, not only in British, but in Foreign Courts of Admiralty, are not merely admissible, but usually even conclusive evidence. Upon the points of adjudication, (Lord Mansfield, in the case of *Bernardi v. Motteux* (l), said,) "all the world are parties to a sentence * in a Court of Admiralty. Here there is a monition published at the Exchange, and in other countries at some place of general resort, and any person interested may come in and appeal at any time if there has been no laches, if there has, the time of appeal is limited. But the sentence as to that which is within it, is conclusive against all persons, unless reversed by a regular Court of appeal; it cannot be controverted collaterally in a civil suit."

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Such sentences are conclusive as to all matters upon which the Courts of Admiralty adjudicate, being within their jurisdiction (m). They are however conclusive on those points only on which they profess to decide.

Where the fact, which is the ground of condemnation, is specifically stated in the decretory part, the sentence is not conclusive as to other facts previously recited in the sentence (n).

(i) Per Buller, J. in *Bernardi v. Motteux*, Doug. 575. But by a French arret, 26th July 1778, it is made a substantive ground of seizure.

(k) *Supra*, Part II. sect. lxxvii. lxxxi.

(l) Doug. 575. In that case the doubt was, whether a condemnation in the French Court of Admiralty proceeded on the ground, that the ship, which in the policy was warranted neutral, was enemies property. Ld. Mansfield, C. J. and Willes and Ashurst, Js. were of opinion that the sentence was too ambiguous to warrant the conclusion. Ld. Mansfield expressed a strong opinion that the proces verbal taken at the time of the capture, and on which the condemnation was founded, and to which the sentence referred, ought to be considered as part of the proceedings, and that the sentence ought not to have been read without it. Buller, J. was of opinion, that the ground of condemnation appeared sufficient on the face of the sentence. See also *Hughes v. Cornelius*, 2 Show. 232. *Baring v. Claggett*, 3 B. & P. 201. *Baring v. Christie*, 5 East, 398. *Barzillay v. Lewis*, Park on Ins. 526.

(m) *Geyer v. Aguilar*, 7 T. R. 681.

(n) *Christie v. Secretan*, 8 T. R. 192. And therefore, where the sentence of a French Court of Admiralty condemned the ship because she belonged to the enemies the French Republic, having previously recited the want of proper documents, it was held that this was evidence of the former fact only. But if there had been a warranty that the ship was not enemies property, the sentence would have been conclusive. *Ibid*.

* Where no ground of condemnation is stated in the sentence, but the ship is condemned generally, the sentence is conclusive evidence to show that the ship was not neutral (o). But if special cause of condemnation be stated, and it be still doubtful whether it proceeded on the ground that the ship was the enemy's property, collateral evidence is admissible to show the real ground of condemnation (p).

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IV.

Breach of
Warranty.

If the ground of decision appear to be not the want of neutrality, but the infringement of a foreign ordinance, inconsistent with the law of nations, the sentence will not be sufficient to prove that the ship was not neutral (q).

The general result of the decisions upon this subject seems to be that the sentence of a foreign court is conclusive on that point which it professes to decide (r); if it be a general sentence of condemnation without assigning any reason, the Courts here will consider that it proceeded on the grounds of the ship being the property of an enemy, but if the sentence itself profess to be made on particular grounds, and they are set forth in the sentence, and appear not to warrant the condemnation, the sentence is not conclusive as to those facts (r).

A condemnation of a vessel by a Court of Vice-Admiralty * abroad, for insufficiency, is evidence as to the mere fact of condemnation, but it was held by Lord Kenyon to be no evidence of the facts contained in it, the document being offered in order to prove that the vessel was not sea-worthy at an antecedent time (s).

* 1183

Where the defence in an action on a policy at 15 guineas per cent. to return two on arrival, was, that upon the arrival of the ship the policy had been adjusted, and the two guineas per cent. demanded and paid; it was left to the Jury to say whether the adventure was closed by a re-

(o) *Saloucci v. Thomas*, Park on Ins. 528.

(p) See *Bernardi v. Motteux*, Doug. 575; and Per Ld. Mansfield in *Saloucci v. Woodmas*. Park on Ins. 529.

(q) Park on Ins. 531. *Mayne v. Walter*, East, 22 Geo. III. ibid. *Pollard v. Bell*, 8 T. R. 434. *Siffken v. Lee*, 2 N. R. 484.

(r) Per Le Blanc, J. in *Pollard v. Bell*, 8 T. R. 434; and see that case, and *Bird v. Appleton*, 8 T. R. 562. See also *Price v. Bell*, 1 East, 663. *Baring v. Royal Exchange Assurance Company*, 5 East, 99. *Kinderley v. Chance*, Park on Ins. 544. *Oddy v. Bovil*, 2 East, 473. *Lothian v. Henderson*, 3 B. & P. 499. 5 East, 155. *Fisher v. Ogle*, 1 Camp. 418; and the cases cited in Park on Ins. c. 18. [See Vol. I. 239, & notes. *Robinson & al. v. Jones*, 8 Mass. Rep. 536.]

(s) *Wright v. Bernard*, Guildhall Sittings after Mich. 1796. Park on Ins. 610. Although the Court of Exchequer had directed that it should not be read in evidence.

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IV.Breach of
Warranty.

turn of the premium, or the money was received with a reservation that the underwriter should still be liable upon the contingency which had happened (u).

The underwriter is still liable to the insured after a total loss and adjustment, although (within the month) whilst the policy remains in the hands of the broker, the initials of the insurer are struck out of the adjustment, to indicate payment, and the broker debits the insurer with the loss (x).

Competency.

* 1184

One underwriter is a competent witness for another who has subscribed the same policy (y), unless he has entered into the consolidation rule, or has paid the loss, upon an agreement that the amount shall be repaid in * case the plaintiff fails in the present cause (z). If he has paid the loss, a mere subsequent promise to repay him under that contingency will not, it seems, render him incompetent (a).

One who was jointly interested in the property at the time of effecting the policy, is not only incompetent on the score of interest, but he is so far to be considered a real party in the suit, although the action be brought in the name of the agent, that his declarations and admissions may be given in evidence by the defendant (b), and where his interest has accrued subsequently to the effecting of the policy by his becoming a partner in the goods, he is incompetent as a witness (c).

In this, as in other cases, a witness is incompetent to repel a charge of negligence or misconduct, for the consequences of which he himself would, if the verdict were given the other way, be personally liable (d). The master is not a competent witness for the defendant to disprove a charge of barratry (e), and the owner is not a competent

(u) The vessel had been seized by the Dutch government, on which the plaintiff's agent, to obtain her liberation, entered into a bond to the attorney-general of the Dutch government, to be in force in case the goods were confiscated; the ship and cargo were confiscated after the arrival of the vessel, and the bond put in force. The Jury found for the defendant. *May v. Christie*, 1 Holt's C. 67.

(x) *Jell v. Pratt*, 2 Starkie's C. 67. See also *Todd v. Reid*, 4 B. & A. 210. 3 Starkie's C. 16. *Russell v. Bangley*, 4 B. & A. 395. *Supra*, tit. *Payment*.

(y) *Bent v. Baker*, 3 T. R. 27.

(z) *Forrester v. Pigou*, 1 M. & S. 14.

(a) *Ibid*.

(b) 2 B. & P. 155.

(c) *Perchard v. Whitmore*, 2 B. & P. 155, in note.

(d) See the general principle, *supra*, 769.

(e) *Bird v. Thomson*, 1 Esp. C. 339.

witness for the plaintiff to prove the seaworthiness of the vessel (*f*).

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A protest made by the captain is not admissible as original evidence, but may be read for the purpose of contradicting his testimony (*g*). Where the plaintiff's agent showed the protest to the defendant, who read it, this, it was held, no more made the instrument *admissible evidence for the plaintiff than a bill in equity would be, which the plaintiff had filed and the defendant had read (*h*).

Competency.

* 1185

POLYGAMY.

ON an indictment for this offence, it is necessary to prove the first and second marriages as alleged in the indictment (*i*), and that the husband or wife of the prisoner was alive at the time of the second marriage. With respect to the first marriage, it is sufficient to prove a marriage in fact to have been celebrated, either in this country, or abroad, according to the law of that country (*k*), although it be voidable, provided it be not absolutely void (*l*) (1).

Proof of the
first marriage.

It has been said, that in the case of bigamy, as well as in an action for criminal conversation, it is essential to prove a marriage in fact, as distinguished from the acknowledgment and cohabitation of the parties (*m*). There is however some room for distinction between the two cases; the defendant in an action for criminal conversation cannot be affected by the acts and declarations of the plaintiff, and the fact of the plaintiff's marriage is not necessarily

(*f*) *Rotheroe v. Elton*, Peake's C. 84.

(*g*) *Senat v. Porter*, 7 T. R. 158.

(*h*) *Senat v. Porter*, 7 T. R. 158; and *Christian v. Coombe*, 2 Esp. C. 489. *Supra*, tit. *Parol Evidence*.

(*i*) See *Crim. Pleadings*; and the Stat. 1 Jac. I. c. 11.

(*k*) East's P. C. 465. 469. 1 Hale, 692, 3. 1 Haw. c. 43, s. 7. Kel. 79, 80. 1 Sid. 171. 3 Inst. 88.

(*l*) 3 Inst. 88.

(*m*) In *Morris v. Miller*, 4 Burr. 2059.

(1) [After a divorce *a vinculo*, in Massachusetts, for adultery, a marriage contracted there by the guilty party is unlawful and void: But such marriage in another State, where it is permitted by the laws thereof, will so far render it valid in Massachusetts, as to entitle the issue to the rights of legitimate children, &c. And it seems that a person so marrying and returning into that state, and living with the second husband or wife, is not liable to the penalties of polygamy. *Inhabitants of West Cambridge v. Inhabitants of Lexington*, 1 Pick. 506. *Commonwealth v. Putnam*, 1 Pick. 136.]

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IV.Proof of the
first marriage.
Admission.

* 1186

within the knowledge of the defendant, as that of the prisoner is in a case of bigamy (*n*); and it seems, that even in the former case, a deliberate and solemn admission by the defendant of the plaintiff's marriage, would be evidence against * him (*o*) (1). In Truman's case (*p*), the cohabitation of the prisoner with Mary Russel was proved, and it was also proved that he had admitted that he had married her in Scotland; and it was proved that he had showed a paper, which he said was a certificate of his marriage, and which was shown to be a writing which purported to be a proceeding before a Court in Scotland against the prisoner and Mary Russel, for having married in a clandestine and disorderly manner, upon which they had appeared, and acknowledged that they were married at the time mentioned in the complaint, and were fined 100 marks. The prisoner was convicted, and all the Judges (Perry, Baron, and Buller, J. being absent), held the conviction to be proper. Some of the Judges observed, that the case did not rest upon cohabitation and acknowledgment, since the defendant had backed his assertion by the production of a copy of a proceeding against him for having improperly contracted his first marriage. Some thought that the acknowledgment alone would have been sufficient, and that the paper was merely confirmatory of such acknowledgment; and one of them took a distinction between an action for criminal conversation, and an indictment for this offence. It is not easy to say on what principle a direct and deliberate admission by the prisoner of his marriage should not be evidence against him of the fact in this case, as well as in any other. Assertions which have been made with a particular view during cohabitation, would indeed of themselves be entitled to very little credit; but a distinct and solemn admission, made after the prisoner has been charged with the offence, and when he knew its probable consequences, seems to be entitled to a very different consideration (*q*). * In general, a prisoner would not be

* 1187

(*n*) See the observations in *Truman's case*, East's P. C. 470.

(*o*) See *tit. Admissions*. In *Norwood's case*, East's P. C. 470, confession and cohabitation, &c. were admitted as evidence to prove the relation of husband and wife in a case of petit treason.

(*p*) East's P. C. 471.

(*q*) I have known a prisoner convicted of bigamy upon proof of his deliberate admission of both marriages, in the presence of his first wife before a magistrate.

(1) [See Vol. II. 939, note (1).]

concluded by any admission, where it appeared that the first marriage was void in point of law (r).

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The evidence in proof of a marriage in fact has already been considered (s). Where one of the parties was a minor at the time of a marriage by license, proof of the consent of the parent, guardian, &c. as required by the marriage-act, must be proved (t).

Proof of the
first marriage.

The enactment of the statute 1 Jac. I. c. 11, is, that if any person or persons *within England and Wales*, being married, or who hereafter shall marry, &c. Hence, it seems, to be necessary to prove that the second marriage was in England or Wales, for it is the second marriage which constitutes the offence (u). Next it must be proved that the first wife was alive at the time of the second marriage.

Of the second
marriage.

The mere presumption as to the continuance of life is not sufficient without some positive proof (x) of the fact, although seven years have not expired.

The prisoner, in defence, may show that the first marriage was actually void, but it is no defence to * show that it was *voidable* only (z). Consequently, being indicted for marrying *A.* whilst *B.* a former wife was living, he may show that he married *C.* before he married *B.* and that *C.* was living when he married *B.*, for then the marriage with *B.* was void; and in such case, if *C.* was dead when he married *A.* he was not guilty of bigamy in marrying her (y).

Evidence in
defence.
* 1188

(r) In a case before Le Blanc, J. at York, the prisoner had confessed the first marriage; but it appeared that the marriage was void for want of the consent of the guardian of the woman, and the prisoner was acquitted.

(s) *Supra*, 932.

(t) *Supra*, 936. In the case of *The King v. Bridgwater*, Cor Le Blanc, J. York Assizes, 1801, such evidence not having been given, the prisoner after conviction was discharged on his recognizance to appear to receive judgment at the next assizes; and the Judges, without determining upon the point, agreed, it is said, that he should not be brought up for judgment. The point was afterwards expressly decided in *Butler's* case, Old B. 1803; and Le Blanc, J. afterwards directed the acquittal of a prisoner at York on the same ground.

(u) 1 Hale, 692. 1 Sid. 171. Dub. 1 Haw. c. 43. Kel. 79. And see the statute 35 Geo. 3. c. 67.

(x) *R. v. Twynning*, 2 B. & A. 386.

(z) 3 Inst. 88.

(y) *Lady Madison's* case, 1 Hale, 693.

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IV.

Defence.

The defendant may also bring himself within the exceptions of the statute 1 Jac. I. c. 11.

1st. That it shall not extend to any person or persons whose husband or wife shall be continually remaining beyond the seas by the space of seven years together (1).

It is no answer to evidence of such absence that the prisoner had notice that such wife, &c. was still actually living (z). Ireland is a place beyond seas within the clause (a).

2ndly. The statute also exempts "any person whose husband or wife shall absent him or herself, the one from the other, for the space of seven years together, in any parts within his Majesty's dominions, the one of them not knowing the other to be living within that time.

It seems that within the king's dominions *means* England, Wales and Scotland; the act must be so construed, in order to render the construction of this clause consistent with the construction of the others which makes Ireland a place beyond seas (b).

* 1189 *The 3d Section provides that nothing in the act shall extend to any person or persons that are at the time of such marriage *divorced* by any sentence had in the Ecclesiastical Court, or to any person or persons where the former marriage hath been by sentence in the Ecclesiastical Court declared to be void and of no effect.

The former of these exceptions extends to a divorce *a mensa et thoro*; for although in Porter's case this point was much doubted (c), it has been fully established by other authorities (d). A second marriage, pending an appeal

(z) 1 Hale, 693. 3 Inst. 88. 4 Bl. Comm. 164. East's P. C. 466. See the observations on this clause, East's P. C. 466.

(a) 1 Hale, 693.

(b) Ibid. See 1 East's P. C. 467, where a *quære* is made, whether the party be bound to use reasonable diligence to inform himself of the fact, and whether he will stand excused if he neglect or refuse to avail himself of palpable means of acquiring such information. Reasonable diligence and neglect are terms not mentioned in the act; and it would be a great extension of the plain words of a penal statute to make the want of diligence or neglect equivalent to actual knowledge.

(c) Cro. Car. 461.

(d) Hale, 699. 3 Inst. 89. 1 Haw. c. 43, s. 5. 4 Bl. Comm. 164. *Middleton's* case, Kel. 27. East's P. C. 467.

(1) [The statute of bigamy, in New York, does not render a second marriage legal, notwithstanding the former husband or wife may have been absent more than five years, and not heard of: It merely purges the felony. *Fenton v. Reed*, 4 Johns. 42. See *Williamson v. Williamson*, 1 Johns. Ch. Rep. 488.]

against a divorce *a vinculo matrimonii*, is also within the exception, although the appeal suspends and may repeal the sentence. In the celebrated case of the Duchess of Kingston (e), it was held, that a sentence in a jactitation suit, although unappealed from, was not conclusive evidence of the invalidity of the former marriage, since the decision on the invalidity of the marriage was merely collateral; and further, that the effect of it might be avoided by proof that it had been obtained by fraud and collusion.

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Defence.

It is also provided by sect. 3, that the act shall not extend to "any person or persons for or by reason of any former marriage had or made within the age of consent."

The age of consent on the part of the man is 14, and of the woman 12, and the case is within the provision if *either* party be within the age of consent, since the power of dissent must be reciprocal (f). If both were above those ages at the time of marriage, although under the age of 21, a second marriage would be felony; so it would be if they agreed to the marriage * after either of them had obtained the age of consent, by which the marriage is completed (g). The first, that is, the true wife, cannot be a witness against her husband, nor *vice versa*, but the second may be admitted to prove the second marriage after the first has been established (h). * 1190 Competency.

POSSESSION.

THE actual possession of property is in many instances absolutely essential to a title to real or personal property, and in all cases, especially where it is of long continuance, is regarded as strong evidence of right. Proof of possession, when necessary.

To constitute a complete title to lands, the union of actual possession with the right of possession, and right of property, the *juris et seisinæ conjunctio*, is essential (a). In the case of a feoffment at common law (b), and of a *donatio mortis causa* (c), and in many instances by the provisions of particular statutes, such as the 21 Jac. I. c. 19, concern-

(e) 11 St. Tr. 262; and see *Martin Lolly's case*, *supra*, 941.

(f) 1 Hale, 17. 694. 1 Haw. c. 43, s. 6. East's P. C. 468.

(g) 1 Hale, 694. 4 Bl. Comm. 165. East's P. C. 468.

(h) *Ann Cheney's case*, East's P. C. 469, Old B. May 1730. Serjeant Foster's MS. *R. v. Griggs*, T. Ray. 1.

(a) 2 Bl. Comm. 199; *Fleta*, l. 3. c. 15. s. 5.

(b) 2 Bl. Comm. 514. Law of Forfeiture, 16.

(c) 2 Bl. Comm. 44; *Irons v. Smallpiece*, 2 B. & A. 551.

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IV.

ing bankrupts (*d*); and the stat. of Frauds (*e*), actual delivery and possession are absolutely essential to confer a title (*f*).

- * 1191 One man may have the actual possession of lands, whilst the right of possession resides in another, and the actual right of property, or *jus merum* in a third * person (*g*). But the mere naked possession of lands is *prima facie* evidence of right against a mere stranger, who can show no colour of title.

Thus, the mere prior occupancy of land, however recent, gives a good title to the occupier, whereon he may maintain trespass against all the world, except such as can prove an older and better title in themselves (*h*).

A possession of twenty years duration by a defendant is a bar to an ejectment, and of thirty years, is a bar to a possessory action by the owner.

Possession,
how proved.

But the nature of such possession is the proper subject of evidence. For the mere corporeal possession by the defendant is not inconsistent with a legal possession by the owner; consequently the owner may show that the defendant occupied merely by his permission, as his agent, or his tenant.

On the other hand, it is competent to the defendant to prove, by opposite evidence, that his possession was adverse, and in spite of the owner, although he was not in the actual occupation of the premises, or to show that the party actually in possession took and retained that possession for him, as his tenant (*i*) or agent (*k*).

(*d*) *Supra*, 609.

(*e*) *Ibid.* 180.

(*f*) As to the necessity of an actual delivery of a chattel to confer a title, see *Trover*. *Vendor and Purchaser*.

(*g*) A disseisor who enters upon the lands of another by force, and turns him out of possession, has mere possession; should the owner acquiesce for twenty years, the owner would lose his right of entry, and his remedy by ejectment, although the right of possession and of property would still reside in him; but after a lapse of thirty years the right of possession would vest in the original disseisor, and the owner would retain the mere right of property; and after an acquiescence of sixty years, the right of property in the former owner would wholly fail.

(*h*) *Catteris v. Cowper*, 4 Taunt. 547. Even in the case of a writ of right. *Jayne v. Price*, 5 Taunt. 326.

(*i*) If an heir demises for years, or at will, the entry of the lessee gives an actual seisin to the lessor. *Com. Dig. Seisin, A. 2; Assise, B. 4.*

(*k*) *Multoque magis liberi et servi in potestate nostra constituti possessionem nostro nomine adprehendere possint. L. 1. § 3. 5.*

* The proof of a lease, and of the receipt of rent (*l*), or even the proof of the receipt of rent (*m*) from one who is in actual possession of land, is evidence of possession by the party who receives it, for the possession of the lessee is that of the lessor (*n*).

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IV.

Evidence of
possession.

Where a party is in actual possession, and has a right to the possession under a legal title, which is not adverse, but claims the possession under another title which is adverse, the possession will not in law be deemed adverse (*o*).

In a writ of right (*p*), or of aiel, mortdauncestor, &c. (*q*), or of assise (*r*), it is necessary to prove a seisin in fact, within the time limited by the statute (*s*), as by proof of an actual entry, or of the receipt of the rents or profits (*t*), or of a recovery and execution (*u*).

Seisin in fact.

And in order to render the heir at law of hereditaments which descend to him the stock of descent, so as to make the estate descendible to his own right heirs; it is requisite that he should be actually seised or possessed; for *non jus sed seisina facit stipitem* (*x*). But if on the death of the ancestor the possession was vacant, then the heir is in law presumed to be in *possession; he has a *seisin in law*, which is sufficient to entitle his widow to dower, although he never had actual possession (*y*). This, however, is but a presumption, which, where the heir marries after the death of the ancestor, is

* 1193

L. 4. f. f. h. t. Proof of an oral authority to the agent is sufficient. Watkins on Descents, 72.

(*l*) 3 Woodes. 333. *Harper v. Brook*, 2 Bac. Ab. Ev. 660.

(*m*) *Denn v. Barnard*, Cowp. 595. *Smith v. Parkhurst*, Andr. 315. 326.

(*n*) For other observations on this subject, vide *supra*, 507.

(*o*) *Doe d. Milner v. Brightwen*, 10 East, 583; *supra*, 509.

(*p*) 4 Co. 9. a. But the heir in a writ of right may allege a seisin in his ancestor.

(*q*) Com. Dig. *Seisin*, A. 2.

(*r*) Ibid.

(*s*) 32 H. 8. c. 2. A seisin in law is sufficient for an avowry upon a distress. 4 Co. 10. a. Com. Dig. *Seisin*, B.

(*t*) Com. Dig. *Seisin*, A. 2.

(*u*) Ibid.

(*x*) 2 Bl. Com. c. 20; *Fleta*, l. 6. c. 2. Watkins on Descents, 58, and the authorities there cited. If, therefore, the heir die before entry, or other actual seisin, or possession obtained, the brother of the half blood will succeed to the inheritance in exclusion of the sister of the whole blood.

(*y*) Co. Litt. 31. a. 266. b.; F. N. B. 149. Watkins on Descents, 38. 49.

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Seisin in fact.

liable to be rebutted by proof of actual possession by another (z). But where lands descend to an heiress, a seisin in fact must be proved, in order to entitle the husband, as tenant by the curtesy; and it is not sufficient that the heiress has a presumptive seisin, or seisin in law, unrebutted by any other seisin (a), except in particular instances, where, from the nature of the case, actual seisin was not attainable (b).

Entry.

* 1194
Evidence of
Entry.

In order to constitute actual seisin, proof of an entry into part (c), in the name of the whole, is sufficient; as where one, having half entered at the window, was forcibly dragged out (d). But the entry, if made on * part, must be made in the name of the whole (e). And proof of mere entry is insufficient, unless it appear that it was done with intent to take possession, as manifested by an express declaration made at the time (f), or by some unequivocal overt act (g).

It is not sufficient that the disseisee entered upon the invitation of the disseisor to dine with him, or see his cellar, or other such purpose aliene from (h) the assertion of right.

(z) Co. Litt. 277. a.; Perk. s. 367; Watkins on Descents, 51. But where the heir is married at the time of the death, the widow is dowable, notwithstanding an abatement, upon the notion of law, that some interval, however short, must intervene between the death of the ancestor and the entry of the abator, during which the possession was vacant, and the heir had a seisin in law. Co. Litt. 165. b. 298. a.; Plowd. 258; 1 Co. 76. b. 174. b.; Watkins on Descents, 50.

(a) Co. Litt. 29. a. & n. (3) 40. a.; 2 Bl. Comm. c. 8.; 1 Co. 97. b.

(b) Co. Litt. 39. a.; Com. Dig. *Seisin*, A. 1; Co. Litt. 29. a. As in the case of a rent, advowson, &c. where the wife dies before the rent becomes payable or the advowson void. Ibid. and Perk. s. 468; F. N. B. 149.

(c) So according to the civil law; "(consequitur) sufficere qualemcumque adprehensionem vel ingressum in rem immobilem adeoque nec opus esse ut quis omnes glebas circumambulet." L. 3. 1. L. 48. L. 2. C. p. t.

(d) Et pur ceo q'il ne purra entrer per le huis, il entra per le fenestre; et quant l'un moitie de son corps fuit deins la meason, et l'autre dehors, il fut treit hors, per q'il port assise, et fuit agarde que le plaintiff recovers. 8 Ass. pl. 25. f. 17. b. Bro. Seisin, 20. 23. Entre Cong. 57 & 61.

(e) 1 Will. Saund. 319; 6 Mod. 44.

(f) Co. Litt. 245. b. *Clerk v. Rowell*, 1 Mod. 10. *Ford v. Lord Grey*, 6 Mod. 44. Plowd. 92, 93.

(g) Watkins on Descents, 47. (d); Robinson's Law of Inheritance, c. 4. p. 33. note (i).

(h) Ibid.

PART
IV.

By an agent.

* 1195

It seems that any act of dominion exercised by the heir over the inheritance, as by-repairing houses, fences, &c. or by receiving rent, will amount to an actual entry (i).

So proof of an entry by an agent is sufficient, whether he be specially appointed for the purpose, or be so considered in point of law; as of the entry or possession of the guardian, or lord of the infant heir (k), or of any other person on the infant's estate (l), * or of the ancestor's lessee for years, tenant by *elegit*, statute merchant, or statute staple, or of the lessee of the owner (m).

The entry of a coparcener, joint-tenant, or tenant in common, is the entry of all the rest, where it is for their advantage (n).

The possession of the lessee for years of the ancestor is the actual possession of the heir, so as to constitute a *possessio fratris* (o). But where the lands are let on a freehold lease there is no actual seisin, unless the heir acquire an actual seisin after the expiration of the lease (p).

In many instances, the owner has an election whether he will consider the party in possession a disseisor, or by his own permission; as where a tenant at will, or by sufferance, makes a lease (q), or a lessee attorns, or merely pays rent to a stranger without coercion (r). So if a man

(i) Watkins on Descents, 76. Robinson's Law of Inheritance, 33. note (i). c. 4.

(k) 1 Com. Dig. Assise, B. 4. Dyer 201. *Goodtitle d. Newman v. Newman*, 3 Wils. 516; Watkins on Descents, 64, (f), and the cases there cited; and *Doe d. Hirst v. Hirst*. York Spring Ass. 1820. Cor. Bayley, J.

(l) An infant may consider any entry made by another on the estate, as made for his use. *W. N. B.* 118. b.; *Co. Litt.* 189. a. *Morgan v. Morgan*, 1 Atk. 489. *Dormer v. Fortescue*, 3 Atk. 140. per *Ld. Kenyon*, *Doe v. Keen*, 7 T. R. 390. *Ex parte Grace*, 1 B. & P. 376; and such entry will constitute a *possessio fratris*. Where a posthumous son was born in one of four houses belonging to his father, and his mother received rents for the three others, and the son died when five weeks old, it was held to be a *possessio fratris*, which excluded the sister of the half blood. *Goodtitle d. Newman v. Newman*, 3 Wils. 516.

(m) *B. N. P.* 104; 1 Com. Dig. Assise, B. 4.; 1 Wils. 176.

(n) *Gil. Ten.* 29; *Co. Litt.* 243. 373. b.; *Hcb.* 120; and will constitute a *possessio fratris* in one who did not enter to the exclusion of the half blood. *Hob.* 128. *Dyer*, 128. pl. 58. *Moore*, 868.

(o) *Co. Litt.* 15. a.; *ib.* 243. a.; and the rule is the same as to copyholds of inheritance, 4 *Co.* 21; *Moore*, 125, pl. 272.

(p) *Doe v. Keen*, 7 T. R. 390.

(q) 1 *Roll.* 661. l. 25; *Cro. Car.* 302; *Com. Dig. Seisin*, F. 3.

(r) 1 *Roll.* 661. l. 45; *Com. Dig. Seisin*, F. 3.

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IV.

By an agent.

* 1196

Possession,
effect of, as
presumptive
evidence.

enter, claiming as guardian where he has no right to be so (c).

In order to constitute a seisin of incorporeal hereditaments in the heir, so as to make him the stock of descent, it is essential that he should actually receive the rents, or present to the advowson, unless it be appurtenant to a manor of which he has had actual seisin (d).

* Where seisin of an inheritance has once been shown, a continuance will be presumed till the contrary be proved (s).

Proof of title to real property shows a seisin in law, and is *prima facie* evidence of possession in fact (t). The proof of title to personal property is evidence of possession; for the law annexes the possession to the right to personal property (u).

The effect of possession, as affording presumptive evidence of right, is very powerful. As against a mere stranger, the simple occupation of property, whether real or personal, however recent, is evidence of a right, and will enable the possessor to maintain trespass or trover (x); and even where the right is otherwise doubtful, ought to turn the scale (y), according to the maxims of the Roman law, in *pari causa possessor potior haberi debet* (z), and *pro rei possessore in dubio est pronuntiandum* (a).

The long-continued and peaceable possession of an easement, or interest in the lands of another, affords, as has been seen, presumptive evidence of right, which must

(c) 1 Roll. 661. l. 20; Com. Dig. Seisin, F. 3; and see other instances there collected.

(d) Co. Litt. 15. b.; F. N. B. 36; Watk. Law of Desc. 77.

(s) See *Cockman v. Farrer*, T. Jones, 182; Plowd. 193, a. 431. a.

(t) *Supra*, 493, note (y).

(u) *Infra*, tit. *Trover*.

(x) As where he finds a jewel; *Armory v. Delamirie*, 1 Str. 505. See tit. *Trover*.

(y) See *Brembridge v. Osborne*, 1 Starkie's C. 374. Where the question was, whether a piece of cloth had been returned by the defendant to the plaintiff, the possession of a note by the defendant, in which the plaintiff requested him to return the cloth by the bearer, was considered to afford *prima facie* evidence that the cloth had been returned. *Shepherd v. Currie*, 1 Starkie's C. 454. An agent's authority to receive payment is usually evidenced by his possession of the securities, *supra*, 1086. The possession of a negotiable instrument is *prima facie* evidence of ownership. *King v. Milsom*, 2 Camp. 5.

(z) L. 2. § 9. Ff. uti poss.

(a) L. 125; L. 128; Ff. de r. i. Cogi possessorem ab eo qui expetit titulum suæ possessionis dicere incivile est. l. 11.

prevail, unless such enjoyment can be * rebutted and explained; and finally, such an enjoyment of lands, where it has been long continued, will at last, by the positive authority of law, ripen into an absolute and indefeasible right, which will prevail against the original proprietor himself. He, according to the notion of the civil law, may justly be regarded as having abandoned that property, and thrown it again, as it were, into its original and natural state (*b*), so that a title to it may again be acquired by occupancy (*c*).

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Effect, as presumptive evidence of title.

Where possession has accompanied a deed of feoffment, livery, in fact, is to be presumed. But it is otherwise where possession has not accompanied the deed (*d*). But this is a mere presumption in fact, of which the Jury are to judge; and the Court cannot infer a lawful conveyance by feoffment unless the Jury find the livery (*e*).

Proof of possession, and of the receipt of rent for twenty years, is evidence of an estate in fee to go to a Jury, although the title, as far as could be developed, appeared to be a long term for years; for it might have been a term to attend the inheritance (*f*).

POWER.

It is a general principle of law, that whenever a power is given to particular persons, to do a written act in a particular manner, or under certain particular circumstances, whether it be to parish officers or magistrates, * as to grant certificates, under which, if duly executed, other persons, especially public officers, are bound to act, or to grant warrants, or make orders, that their authority must appear on the instrument itself. It must thereby appear that they are the persons authorized, and that the certificate, warrant, or order, was made in the manner and under the cir-

General principle.

* 1198

(*b*) *Id quod nullius est, ratione naturali occupanti conceditur.* Ff. 4. b. s. 3; see 2 Bl. Com. 258.

(*c*) *Quum enim quæ nullius sunt cedant occupanti, et res pro derelictis habitæ pro rebus nullius habeantur, nihil sane æquius est, quam id, quod quis bona fide et justo titulo tempore longo possedit, et ab altero non est vindicatum, possidenti adquiri.* Heineccius, ad Pand. pars, 6, s. 206; Gro. de Jure Belli atque Pacis, p. II. 4.

(*d*) Roll. Rep. 192. 227; Tri. per Pais, 209; Cro. J. 463; Bac. Abr. Ev. 648.

(*e*) Roll. Rep. 132; Tri. per Pais, 339.

(*f*) *Denn v. Barnard*, Cowp. 595.

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cumstances required. Otherwise the certificate, warrant, or order, is not obligatory, but void (a).

Hence, where the question was, whether a certificate, signed by two churchwardens and one overseer, but bearing only two seals, was a legal and valid certificate, under the stat. 8 & 9 W. 3. c. 30 (b), the Court held that the certificate had not been properly executed (c). Lord Ellenborough, in giving judgment, observed, "in considering how far the cases of deeds are applicable to the present, it is to be recollected, that, in those cases, the parties alone, under whose authority the deeds were executed, are bound by them; but the present is the case of the execution of a power, which binds and operates upon other persons at their peril, and subjects them to indictments as for crimes, in case of their disobedience to the power, if it be duly executed."

* 1199 With regard to the execution of powers created by private authority, it is a settled rule of law, that all the circumstances required by the creators of the * power, however unessential, and otherwise unimportant they may be, must be observed, and cannot but be satisfied by a strict and literal performance (d).

Thus, in the case of *Thaire v. Thaire* (c), where there was a submission to arbitration, "so that the award be delivered under their hands and seals," it was made a question, whether an award sealed, but not signed, was a good award; the point reserved being, whether the sealing, which was virtually a signing, was sufficient; or, whether the words of the submission should be intended, as in common parlance, an actual writing of their hands. The Judges of the Common Pleas were at first divided upon that point. It was finally determined, however, by the

(a) Per Ld. Ellenborough, *R. v. Austrey*, K. B. East, T. 1817.

(b) Which requires certificates to be under the hands and seals of the churchwardens and overseers, or the major part of them, or under the hands and seals of the overseers, where there are no churchwardens.

(c) *R. v. Austrey*, K. B. East. Term, 1817, Phillips on Ev. 416. 3d ed. The certificate was duly attested, and allowed by two magistrates, and purported to be the certificate of A. B. and C. D. churchwardens, and of E. F. overseer. One seal was opposite the first two names, and the other seal opposite to the last; no trace of any other seal appeared on the instrument, which was thirty years old.

(d) Per Ld. Ellenborough, in *R. v. Austrey*, K. B. East. Term, 1817.

(e) Palm. 109, cited by Ld. Ellenborough, in *R. v. Austrey*.

whole Court, that a virtual signing would not do, but that there ought to be an actual signing under their hands.

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It has been solemnly decided, in several cases, that a power, to be executed by signing and sealing, to be attested by witnesses, is not well executed unless the attestation shall express that the signing, as well as the sealing, were witnessed. Thus, in the case of *Doe d. Mansfield v. Peach* (f), where the power was to be executed "by any deed or writing under the *hands and seals* of the parties, to be by them duly executed in the presence of, and attested by, two or more witnesses," and the attestation was only of the *sealing and delivery*, the Court of King's Bench held that the attestation was insufficient. The same point was decided by a majority of the Judges of the Common Pleas in the case of *Wright v. Wakeford* (g).

Proof of execution.

* Upon the same principle it was held, that a power, to be executed by any appointment, in the nature of a will, to be *signed and published* in the presence of, and attested by, two or more credible witnesses, was not well executed by an attestation which noticed the *signing only*, and not the publication (o). * 1200

And such a defect in an attestation cannot be remedied by a new attestation, indorsed upon the instrument after the death of one of the parties. For such an attestation cannot give to the act of the parties an operation after their death, which it never had during their lives (h).

And where the attestation in such a case is defective, the defect cannot be supplied by evidence that the witnesses did in fact attest the signing, as well as the sealing (i).

Where, however, the terms creating the power do not

(f) 2 M. & S. 576.

(g) 4 Taunt. 214.—Mansfield, C. J. dissentiente. In consequence of the decisions in these two cases, the stat. 54 G. 3. c. 168, enacted, "that every deed or other instrument, already made with the intention to exercise any power, &c. shall, if duly signed and executed, and in other respects duly attested, be from the date thereof, and so as to establish derivative titles, if any of the same validity and effect, and provable in like manner, as if a memorandum of attestation of signature, or being under hand, had been subscribed by the witness, and the attestation expressing the fact of sealing and delivering, without expressing the fact of signing, or any other form of attestation, shall not exclude the proof, or the presumption, of signature." This act is merely retrospective.

(o) *Moodie v. Reid*, 7 Taunt. 355.

(h) P. C. in *Doe d. Mansfield v. Peach*, 2 M. & S. 576; *Wright v. Wakeford*, 4 Taunt. 214; *Wright v. Barlow*, 3 M. & S. 512—S. P.

(i) *Doe d. Hotchkiss v. Pearce*, 6 Taunt. 402; 2 Marsh. 102.

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require an attestation of the signing and sealing by the witnesses, but merely that the instrument shall be signed, sealed, &c. *in their presence*, it seems, that proof, in fact, that they did witness the requisite particulars, signing as well as sealing, is sufficient, although the attestation applies to the sealing and delivery only (k).

* 1201

* PRESCRIPTION, GRANT, &c.

Nature of evidence to prove a title.

As the ownership of property is a mere arbitrary and artificial relation, it follows, that the evidence to prove that relation must also be of an artificial character, and that it does not admit of proof through the natural medium of the senses.

The most direct indications of property consist in the evidence of those forms and ceremonies of investiture and written instruments which the law has appointed for transferring the right of property, and authenticating and commemorating such transfers.

For such purposes, the ancient mode of alienation, by open and formal livery, before witnesses, and the more modern conveyances by deeds, solemnly authenticated, were devised and appointed. These are the most direct proofs which the nature of the case admits of. But these alone are inadequate to the purposes of proof and the security of property. The living witnesses of such transfers perish in the ordinary course of nature; and the most durable memorials which human ingenuity can devise are liable to decay, and to casual loss and destruction, as well as wilful spoliation. In order, therefore, to supply the place of these, the most direct and authentic testimonies, recourse must be had, as in other cases, to indirect * and circumstantial evidence, for the purpose of proof. Of those circumstances which afford presumptive evidence of property, whether real or personal, continued possession is, beyond all comparison, the strongest in its nature and operation. In the infancy of society, mere occupation would

* 1202

Grounds for presuming a title.

(k) Thus, where the deed, which created the power, directed merely that it should be executed by any writing, to be signed and sealed in the presence of two witnesses, without directing that they should attest such execution; and the deed, in pursuance of the power, was expressed to be executed in the presence of the witnesses, but the attestation applied to the sealing and delivery only. The Chancellor was of opinion that it might be properly left to the Jury to presume that the deed was signed, as it professed to be, in the presence of the witnesses, who attested the sealing and delivery. *M^{rs} Queen v. Farquhar*, 11 Ves. 467; 17 Ves. 458.

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usually confer an actual title, and, in some instances, even to this day, such a title prevails (a); and, by a slight extension of the principle, an owner who has long acquiesced in the adverse enjoyment of property by another, may be considered to have abandoned it, and the occupant to be entitled to it by reason of his occupancy.

So forcible is the presumption derived from long-continued possession, and so conducive is it to the peace and quiet of society to protect such a possession, that, in many instances, it is absolutely conclusive of the right to the subject-matter, by virtue of positive arbitrary rules and statutory enactments; and, in numerous other cases possession affords presumptive evidence of title (b). Rules of this nature, whether conclusive, or of inferior force, are founded, * 1st. On the principle of law, which will not presume any man's act to be illegal, and will therefore attribute such continued use and enjoyment to a legal, rather than an illegal, origin, and will ascribe long-continued possession, which cannot otherwise be accounted for, to a legal title. 2dly. Upon a reasonable and very forcible presumption, that the acquiescence in such enjoyment for a long period, by those whose interest it was to interrupt it, arose from the knowledge and consciousness, on their part, that the enjoyment was rightful, and could not be

* 1203

(a) 2 Bl. Comm. *supra*, 1197.

(b) The maxim of law is "ex diuturnitate temporis omnia presumuntur solemniter esse acta." Co. Litt. 6. Hence, if in the case of a feoffment the witnesses be dead, quiet possession for a length of time will make a strong or violent presumption, which stands for proof. Ibid. 1 Mod. 117; 1 Lev. 25; Palm. 427. In *Eldridge v. Knott*, Cowp. 215, Lord Mansfield observes, that "there are many cases not within the statute of Limitations, where, from a principle of quieting possession, the Court has thought a Jury should presume any thing to support a length of possession." Lord Coke says, "that an act of parliament may be presumed, even in the case of the Crown, which is not bound by the statutes of limitation." A grant may be presumed from great length of possession; it was so done in *the Mayor of Hull v. Horner*, Cowp. 102. Not that in such cases the Court really thinks that a grant has been made, because it is not probable that a grant should have been made, but we presume the fact for the purpose, from a principle of quieting possession."

The presuming of a deed from long usage is a modern invention of the judges for the furtherance of justice, and the sake of peace where there has been a long exercise of an adverse right. For instance, it cannot be supposed that a man would suffer his neighbour to obstruct the light of his windows, and render his house uncomfortable, or to use a way over his meadow with carts and carriages for twenty years, unless some agreement had been made between the parties to that effect, of which usage is the evidence. P. C. *Knight v. Halsey*, 2 B. & P. 206.

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disturbed. And also on a consideration of the hardship which would accrue to parties, if, after long possession, and when time had robbed them of the means of proof, their titles were to be subjected to rigorous examination. Were this to be permitted, length of possession, instead of strengthening, would weaken every man's title to his estate. 3dly. Upon a principle of public policy and convenience, which operates to the preservation of the public peace, and the quieting of mens possessions (c), and can work no prejudice except to those who are guilty of negligence in the conduct of their affairs (d).

In considering the nature and effect of circumstantial evidence in questions of title, the order which belongs to presumptive evidence in general, naturally presents itself. Accordingly, it will be proper to consider, 1st. In what cases long-continued and peaceable * possession is *conclusive* as to the right. 2dly. In what instances the law, although it does not conclusively infer a right, nevertheless gives to the evidence a *technical* force and operation, beyond its mere *natural* force and operation, as estimated by a Jury. 3dly. In what cases the law raises no *technical* presumption, but the Jury are left to make their own inference, according to the *natural* weight of the evidence.

The inference of title from adverse undisturbed enjoyment, is *conclusive*, 1st. in cases of *prescription*. 2dly. In the different instances which fall within the statutes of Limitation.

Prescription.
Time and
usage.

To every prescription *time* (e) and *usage* are insepa-

(c) See Ld. Mansfield's observations in *Eldridge v. Knott*, Cowp. 215, & *supra*, note (b).

(d) According to the Roman law, Ea (usucapio vel longi temporis præscriptio) nocet iis, qui in inquirenda re sua fuere negligetiores. Pand. L. 41. tit. 3; Heinecc. ad Pand. pars. 6. s. 212. And such a prescription was not allowed to operate against those who, from infirmity, &c. were not chargeable with negligence and laches in acquiescing in the possession of the property by another, "Ut agere non valenti non currat præscriptio." L. 1. § 2.

(e) The Roman law was infinitely more artificial than the law of England in its rules relating to the nature and effect of the continued possession of property. A prescription was either, 1st, Usucapio vel longi temporis præscriptio; or, 2d. Præscriptio longissimi temporis. Pand. lib. xli. tit. iii.—To constitute the first, a continued possession of three years, in the case of moveables, and, in the case of immovables, of ten years, *inter presentes*, and of twenty years, *inter absentes*, was requisite. It was also essential that the possession should be *bona fide* "ut ignoret possessor rem esse alienam potiusque existimet eum a quo causam habet tanquam dominum jus alienandi habuisse. L. 109. Ff. de v. s. Where the possession was *mala fide*, a *præscriptio longissimi temporis*; i. e. of thir-

nable incidents (e). With respect to time, it must have existed from time whereof the memory of man is not to the contrary, which is to be understood not merely of living memory, but of memory by the means of * records, or other written memorials (f). And therefore, where there is any proof of the original or commencement of any thing, it cannot be claimed by prescription (g); unless, indeed, the commencement were before the reign of Richard the First, for then it is considered to have existed immemorially on an equitable construction of the stat. 2d of Westminster, which limited that time for a writ of right (h).

Prescription.
Time.
* 1205

Hence, proof of an ancient grant of the right or liberty, without date, does not necessarily destroy the prescription; for it may have existed before the time of legal memory; and, even supposing the grant to have been executed since, this may have been done for the purpose of confirming a prescriptive right (i).

A prescription is good, if it can be supposed to have had a legal commencement (k). And, therefore, in such case, it is unnecessary, in order to the establishment of a prescription by evidence, to prove a consideration to support the right or obligation.

Consideration.

But in order to support a prescription against public right, a consideration must be proved; as where toll-thorough, that is, a toll for passing over the public highway, is claimed (l). But toll-traverse, that is, toll for passing

ty years, was necessary to confer a title. L. 8. s. 1. de prax xxx. Et quidem triginta annorum prescriptione opus est, si res usucapi nequeunt ob auctoris malam fidem. Heinec. ad Pand. pars 6. sec. 223. In other instances, a prescription of forty years, and in some of one hundred years; in others, of time immemorial; "cujus in contrarium non exstat memoria," was essential to confer a title. L. 2. §. 1. 7.; L. 23. § 2.; Heinec. ad Pand. p. 6. s. 225.

(e) Co. Litt. 113.

(f) Co. Litt. 115. a. [See *Gayetty v. Bethune*, 14 Mass. Rep. 49.]

(g) Ibid. Hence, although the Pope's bull be evidence under a special prescription to be discharged of tithes, it is no evidence under a general prescription, because it shows the commencement of the custom. Palm. 38. B. N. P. 248.

(h) 2 Roll. 269. l. 10. 45.

(i) 2 Bl. Rep. 989.

(k) 1 T. R. 667. Hence a custom differs from a prescription; for a custom is good if it be not unreasonable.

(l) *Mayor and Burgesses of Nottingham v. Lambert*, Willes, 111; Com. Dig. tit. Toll-thorough (c); where it was held, that a prescription to take toll for passing on an ancient navigable river, through the plaintiff's manor, was bad. And see *Truman v. Walgham*, 3

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through the private lands of the owner may be claimed without alleging or proving any consideration.

* 1206 * And where the plaintiff claimed toll-thorough, and showed that the soil and the tolls before the time of legal memory belonged to the same owner, although they had been severed since, it was held, that it was to be presumed that the right of passage had been granted to the public in consideration of the toll (*m*).

Usage.

If repeated *usage* within the time of memory cannot be proved, the prescription fails (*n*); as, if it appear that a town was incorporated before the time of Richard the First, but that the franchise was never afterwards used (*o*).

So a *chaum* or interruption in the *usage* within time of memory will destroy the prescription. But a tortious interruption will not destroy it (*p*); neither will a discontinuance by the lease of a *terre-tenant* (*q*).

A prescription is also destroyed by proof of unity of possession (*u*).

Presumptive
evidence.

Although prescriptive enjoyment of a right, when established, be conclusive as to title, yet the evidence to prove a prescription must, from the nature of the claim, usually be *presumptive*. So difficult is it to establish the continuance of an *usage* through many centuries past by the aid even of written memorials. In order to raise such a presumption, evidence should be given, such as the case affords, of the usage and exercise of * the right, as far as living memory can go, by witnesses who have had actual knowledge of the fact. When this source has been exhausted recourse must be had in the case, both of public and private prescriptions, to ancient documentary evidence. But here it may be observed, that continued usage and exercise of a right, carried no farther back than even living memory can go, will frequently afford *prima facie* evidence whereon a prescription may be presumed, which will prevail, if not rebutted by some evidence to the contrary (*a*).

* 1207

Wils. 296. *Richards v. Bennett*, 1 B. & C. 223. *Colton v. Smith*, Cowp. 47. *Crispe v. Belwood*, 3 Lev. 424.

(*m*) *Lord Pelham v. Pickersgill*, 1 T. R. 660.

(*n*) Co. Litt. 113. b.

(*o*) 2 Roll. 268. l. 52.

(*p*) 2 Inst. 653.

(*q*) 2 Inst. 654; Com. Dig. tit. Prescription.

(*u*) 3 Taunt. 24. Com. Dig. tit. Suspension, G. *infra*, 1213.

(*a*) Thus, the uninterrupted possession of a pew in a church for thirty years is presumptive evidence, against a wrong doer, of a title by prescription. *Griffith v. Matthews*, 5 T. R. 296; but see

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Prescription,
presumptive
evidence of.
Ancient deeds.

Ancient deeds, and other instruments relating to the exercise of the right, and derived from the proper custody, are also admissible in proof of a prescription. They may be considered to be in the nature of solemn declarations, accompanying acts which, it has been seen, are always admissible on general principles, as part of the *res gesta*; and although it cannot be proved that any act of enjoyment was immediately consequent upon ancient deeds, yet when such deeds are found in the natural and legitimate repository, where they might be expected to be found, on the supposition that they had been *acted upon*, a fair presumption arises that such has been the case. It would be too much to presume that an ancestor had forged the deeds in order to enable some remote descendant to commit a fraud, especially as such evidence, if it stand alone, unsupported by proof of the actual enjoyment of the right in modern times, is of no avail.

When the enjoyment has been established, as far as living memory can go, then ancient instruments, connected with the exercise of the right by their contents, and deriving authority from the place in * which they are found, are in the nature of solemn declarations, which, although they do not *actually* accompany the enjoyment proved, are yet as proximate to it as the nature of the case will permit. * 1208

It has already been stated that doubts have been entertained on the question, whether reputation and traditional declarations be admissible to prove a private, as they are to prove a public, prescription; and the practice on this point has not been uniform (c).

Socks v. Booth, 1 T. R. 428. In *Res v. Jolliffe*, 2 B. & C. 54, it was held that a usage in a court-leet but for twenty years as to the nomination of persons to be summoned on a jury, was evidence of an immemorial custom.

(c) Vide *supra*, part I. sec. xl. In *Morewood v. Wood*, 14 East, 327, n. upon a motion for a new trial, the question was, whether such evidence was admissible to prove a prescriptive right, annexed to a particular estate, of digging stone upon the waste of the lord of a manor; the Court were divided upon the point, *Kenyon*, C. J. and *Ashurst*, being of opinion against the evidence. *Buller* and *Grose*, Justices, for it.

In *Blackett v. Lowes*, 2 M. & S. 494, where one question was, whether evidence of reputation was admissible to show the right of customary tenants to cut down wood on the plaintiff's estate, *Ld. Ellenborough* said, that reputation was out of the question; but a new trial was in that case granted, on the ground, that evidence of an old agreement, between a former lord of the manor and his customary tenants, by which the former agreed to set out yearly sufficient wood for repairing their houses, and the latter agreed not to cut down wood, &c. had been rejected. In

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Reputation,
&c.

* It seems, however, to be very doubtful, whether such evidence, in the case of a merely private prescription, would now be deemed admissible. At all events, assuming such evidence to be admissible, it is obviously very weak in its nature, and entitled to less credit than is due to similar evidence in the case of a public prescription : for there, the subject being a matter of public and general interest, it is probable that the existence and nature of the right would be matter of public experience, notoriety, and discussion, a presumption which cannot be fairly made where the right is of a merely private nature.

It is also to be remembered, that such evidence is of no

In *Barnes v. Mawson*, 1 M. & S. 77, it was held, that the lord of a manor might show that there was a known distinction in the manor, between old and new land, and might prove the right of the lord to take the coals under freehold parcels of the new lands, as well by acts of enjoyment as by reputation.

In *Doe d. Didbury v. Thomas*, 14 East, 323, evidence of reputation was held to be inadmissible to prove that lands devised by A. to the defendant in ejectment had formerly belonged to I. S. the father of A. B. under whose will, made upwards of fifty years before, the plaintiff claimed, although the reputation was coupled with corroborative evidence.

In *Clothier v. Chapham*, 14 East, 331, n. evidence of reputation, that a particular waste was parcel of a particular farm, was rejected at *Nisi Prius*.

In *Reed v. Jackson*, 1 East, 357, *Ld. Kenyon* said, that reputation was evidence, with respect to public rights claimed, but not with respect to private rights.

In *Powell v. Ireland*, Peake's L. E. 14, *Chambre, J.* admitted evidence of general reputation as to the boundaries of a town, but rejected it when offered to prove that houses once stood where there were then none. See *Chatfield v. Fryer*, 1 Price, 253. In *Davies v. Lewis*, 2 Chit. R. 535, hearsay evidence was admitted on the question, whether the *locus in quo* was parcel of a sheep-walk.

In *R. v. Eriswell*, 3 T. R. 723, *Ld. Kenyon* denied that reputation, with respect to prove a particular fact, i. e. the presentation to a benefice, was admissible.

In *Withnell v. Gartham*, 1 Esp. C. 324, where the question was as to the mode of electing a schoolmaster, by the vicar and churchwardens of Skipton, *Ld. Kenyon* held, that tradition, as to the usage, was admissible, the distinction being between public and private rights.

On the other hand, in B. N. P. 295, it is stated generally, and without qualification, that in questions of prescription it is allowable to give hearsay evidence ; and that therefore, where the issue was on a right of way over the plaintiff's land, the defendants were admitted to give evidence of a conversation between persons, not interested, then dead, wherein the right of way was acknowledged.

In *Webb v. Potts*, Noy, 44, the court held, that such evidence was admissible to prove a modus for a particular farm.

Morewood v. Wood, 14 East, 327, in the note, *supra*, 1208, *Buller* and *Grose*, Justices, were of opinion that such evidence was admis-

avail unless it be supported by proof of acts of * enjoyment of the right or privilege (d). And also, that reputation, or traditionary declarations, to be admissible must be general, as to the existence of the right, and that reputation or tradition as to particular facts are inadmissible (e).

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Prescription.
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&c.

In the late case of *Weekes v. Sparke* (f), where the question raised by the pleadings was, whether the plaintiff in trespass had a right to abridge a right of common, by using the land for tillage, the Court held, that evidence of reputation in support of this right was admissible, because the right claimed was an abridgment of the general right over the waste, and * affected a great number of occupiers within the district.

* 1211

If the party fail in proving part of the prescription as alleged, he fails altogether. For a prescription, being in its nature entire, cannot be divided into parts, so as to be supported in part, and in part rejected (g).

Variance.

sible. See also the observations made by the Judges in the case of *R. v. Brinsell*, 3 T. R. 709, where *Grose*, Justice, observed generally, that reputation was evidence to prove prescriptive rights, although persons permitted to give evidence of what they have heard from dead persons concerning the reputation of the right, are not permitted to state facts of the exercise of the right, which the deceased persons said they had seen.

In *Price v. Littlewood*, 3 Camp. 288, in an action for the disturbance of the plaintiff's pew, claimed in right of a messuage, an old entry in the vestry book, signed by the churchwardens, stating, that the church had been new leaded, and repaired at the expense of the parish, with the exception of the two galleries, which had been repaired at the cost and charges of A. and B. (under one of whom the plaintiff claimed) in consideration of their using the galleries; *Ld. Ellenborough* held that this was admissible, as it showed the reputation of the parish on the right; but *note*, that he added also, as a reason, that it was made by the churchwardens, upon a point within their official authority.

In the case of the *Bishop of Meath v. Ld. Belfield*, B. N. P. 295; 1 Wils. 215. After the plaintiff, in a *quare impedit*, had given in evidence an entry in the register of the diocese of the institution of one K., a blank being left in the register for the name of the patron, he adduced parol evidence of a general reputation in the country, that he had been presented by one, under whom the plaintiff claimed; and it was held, upon a bill of exceptions tendered, that such evidence was admissible, on the ground, that the presentation might be by parol, and that what commenced by parol might be transmitted to posterity by parol.

(d) *Supra*, Pt. I. sec. xlii.

(e) 5 T. R. 29. 32; *supra*, Pt. I. sec. xxxix.

(f) 1 M. & S. 691.

(g) *Morewood v. Wood*, 4 T. R. 159.

PART
IV.

Variances.

If a party prescribe generally for common for commonable cattle, the plea is not supported by evidence of a right of common for some particular species of commonable cattle only (h).

A prescription for common appendant to three hundred acres in four towns, is not proved by evidence of a right of common appendant to two hundred acres in two towns (i). And if a right of common be claimed in certain land, evidence that the right has been released in part of the land will defeat the prescription so laid (k).

But proof of a more ample right than that claimed is no variance. A plea prescribing a right of common for sheep will be supported by proof of a right of common for sheep and cows (l).

So it is no variance, although it appear that to the enjoyment of the right a condition is annexed, in the nature of a consideration for such enjoyment.

A prescriptive right of common for copyholders was alleged, and the right was found; but it was also found that the copyholders used to pay to the lord a hen and five eggs yearly; it was held that the prescriptive right was sufficiently alleged, although the annual payment * was not stated (m). And where a prescriptive right of common appurtenant was claimed for so many sheep, every year and at all times of the year, and the right was proved; but it also appeared that the tenant of an adjoining farm was entitled to have the sheep folded on his lands whenever they were fed on the common, it was held that the prescription was well proved. That the words *at all times* must be understood with reference to the usual custom of folding sheep, which seldom, if ever, remained on the common in the night-time, but were folded; and that the folding of the sheep at night was not to be regarded as part of one entire prescription for common of pasture, but rather as a consideration subsequent to the enjoyment of the right (n).

(h) *Peirce v. Henley*, B. N. P. 59, 60; *Rotherham v. Green*, Cro. Eliz. 598; 1 Camp. 309, 315.

(i) B. N. P. 60; Hob. 109; Cro. Eliz. 531.

(k) *Rotherham v. Green*, Cro. Eliz. 593.

(l) *Bushwood v. Pond*, Cro. Eliz. 722; *Bailiffs of Tewkesbury v. Bricknell*, 1 Taunt. 142.

(m) *Gray v. Fletcher*, B. N. P. 59; Cro. El. 593; 5 Co. 78. b. But see *Lovelace v. Reynolds*, Cro. Eliz. 563, where an issue was taken on a plea prescribing for a right of common generally, and the Jury found that the party had the right, paying 1d. for it, it was held that the plea was not supported, the prescription being entire.

(n) *Brook v. Willet*, 2 H. B. 221.

The precise quantity of the estate to which the prescriptive right is claimed as appurtenant, is not material. Thus, a prescription for common appendant to a house and twenty acres is sufficient, although it appear that the right is appurtenant to a house and but eighteen acres (o).

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IV.
Variance.

Where the question in a replevin suit was as to the liability of the plaintiff to repair the banks of a river, a finding by the Jury, that all occupiers have used to repair, was held to be immaterial, for possibly the occupiers were but particular tenants, who could not bind the inheritance (p).

A justification in trespass, under a custom for the tenants of a particular copyhold tenement, parcel of a *manor, stated in the plea to cut turf, &c. to be used on the tenement, is not supported by evidence of a general usage of that nature pervading the whole manor (q). * 1213

In answer to evidence tending to prove a title by prescription, the defendant may adduce proof of a commencement within time of memory. As by showing that a pew, claimed by prescription, began to exist within the time of legal memory (r). But a grant within time of memory does not necessarily destroy the prescriptive claim, for it may have been intended merely in confirmation (s). Or the defendant may show that the right has been extinguished by unity of possession (t). Defence.

So he may show that the usage has not been continued (u). Or that the thing to which the prescription was attached no longer exists (x). But it is not sufficient to show a mere circumstantial variation in that to which the prescription is annexed. As where a man prescribes for a water course to a fulling mill, and he converts it into a

(o) B. N. P. 60; Cro. Eliz. 531.

(p) *Rooke's case*, 5 Co. 100.

(q) *Wilson v. Page*, 4 Esp. C. 71.

(r) *Griffith v. Matthews*, 5 T. R. 296.

(s) 2 Bl. Rep. 989.

(t) 3 Taunt. 24, & *infra*, tit. *Way*. B. N. P. 74, where it is laid down, that a right of way may be extinguished by unity of possession, unless it be a necessary one, and then it shall not; but a right of watercourse does not seem to be extinguished by unity of possession in any case. Latch, 153. Poph. 166; Com. Dig. Suspension, G. If a man has a franchise by prescription, and the king grants him a charter, he cannot afterwards claim it by prescription. Com. Dig. Prescription, G.

(u) *Supra*, 1206.

(x) 4 Co. 48; Com. Dig. Prescription, G.

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* 1214

grist-mill (y); or a corporation takes a new name (z); or that a public road, which existed by prescription, but which could be used only when the tide was out, may, in consequence * of alterations made in the adjacent river by virtue of an act of parliament, be used at all times (a).

Statutory bar.

Upon the principle of policy in quieting mens possessions and preventing litigation, the enactments of the several statutes of limitation are founded (b). Thus, by the stat. 32 H. 8. c. 2, seisin in a writ of right must be within sixty years; and writs of novel disseisin must be sued within thirty years after the disseisin complained of. By the stat. 21 J. 1. c. 16, writs of formedon must be sued within twenty years next after the title or cause of action first accrued, and by the same statute, no one shall enter upon any lands, tenements, or hereditaments, but within twenty years next after his title accrued.

The statute of Fines (c) affords another instance to the same effect.

Technical
force and operation.

Secondly, where the law makes no conclusive inference, but nevertheless gives to the evidence a *technical* efficacy beyond its simple and natural force and operation.

Under this head are to be classed the presumptions of legal title, by grant or otherwise, to incorporeal rights in the lands of others, founded on adverse possession and enjoyment of such rights for the space of twenty years.

The presumption of right in such cases is not conclusive; in other words, it is not an inference of *mere law*, to be made by the courts, yet it is an inference which the courts advise juries to make whenever the presumption stands un rebutted by contrary evidence (1). Such evidence in theory is mere presumptive evidence; in practice and effect it is a bar. The grounds of such presumptions have been already adverted to (d).

* 1215

Grant of
incorporeal
right.

* The precise period of twenty years seems to have been adopted in analogy to the enactment of the statute of Limitations, which makes an adverse enjoyment of twenty years a bar to an action of ejectment (o); for as an adverse

(y) 4 Co. 87; Com. Dig. Ibid.

(z) Ibid.

(a) *R. v. Tippet*, 3 B. & A. 193.

(b) Vide *supra*, tit. *Ejectment—Limitations—Possession*.

(c) 4 H. 7. c. 24.

(d) *Supra*, 1203.

(o) See *Holcroft v. Heel*, 1 B. & P. 400. 2 Saund. 175. a.

(1) [See *Post*, 1244, note (1).]

possession of that duration will give a possessory title to the land itself, it seems to be also reasonable that it should afford a presumption of right to a minor interest arising out of the land (e) (1).

Thus, an enjoyment of lights (f); of a right of way over the land of another (g); of a stream of water flowing

(e) *Supra*, 502. 989, and see *Campbell v. Wilson*, 3 East, 294; *Read v. Brookman*, 3 T. R. 151. Notwithstanding the admission of these presumptions, which appear now to be established and necessary rules of law, this branch of jurisprudence cannot but be considered as very rude and inartificial, more especially if it be contrasted with the laboured distinctions of the Roman law upon the same subject. The presumption being one of law, arising out of the fact of continued and adverse possession unrebuted, ought, as a rule of law, to be applied whenever the facts to which it is applicable arise; and yet, unless the Jury strain their consciences so far as to find a grant, in the actual existence of which the Court itself may not believe (see *Ld. Mansfield's* observations, *supra*, 1202), the rule of law is inapplicable. In other words, the rule is useless, unless the Jury, upon the recommendation of the Court, find a fact, which, in all human probability, never existed, and which is perfectly unconnected with the real merits of the case. Surely so heavy a tax upon the consciences and good sense of Juries, which they are called on to incur for the sake of administering substantial justice, ought to be removed by the assistance of the legislature. *Vide infra*, tit. *Presumption*. *Doe v. Calvert*, 5 Taunt. 170, *supra*, tit. *Payment*. The use of the banks of a river for more than 20 years by fishermen who have occasionally sloped and levelled them, is evidence of a grant by the owner of the soil. *Gray v. Bond*, 2 B. & B. 667.

(f) *Darwin v. Upton*, 26 G. 3. 2 W. Saund. 175. c. *supra*, 989. *Lewis v. Price*, 2 W. Saund. 175. a. *Dougal v. Dawson*, 2 W. Saund. 175. b.

(g) *Keymer v. Summers*, B. N. P. 74. It has been seen, that an enjoyment of a right of way by the public, far short of twenty years, is sufficient to afford a presumption of a dedication to the public. *Supra*, tit. *Highway*.

(1) [See, on this subject, *Hill v. Crosby*, 2 Pick. 466. *Sherwood v. Burr & al.* 4 Day, 244. *Chalker v. Dickenson*, 1 Conn. Rep. 382. *Ingraham v. Hutchinson*, 2 Conn. Rep. 584. *Ricard v. Williams & al.* 7 Wheat. 59.

There is no difference in the doctrine, whether the grant relate to corporeal or incorporeal hereditaments. A grant of land may as well be presumed, as a grant of a fishery, or of common, or of a way. (See *Post*, 1221, note (1).) In general it is the policy of courts of law to limit the presumption of grants to periods analogous to those of the statute of limitations, in cases where the statute does not apply.—But where the circumstances of the case are very cogent and full, there is no absolute bar against the presumption of a grant, within a period short of the statute of limitations. Per *Story*, J. 7 Wheat. 109, 110.]

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through the property of another (h); of a market * in the neighbourhood of another market belonging to a grantee under the crown (i), affords *prima facie* evidence of a legal right by grant or otherwise, which, if un rebutted by opposite evidence, ought to prevail.

Upon the same principles the uninterrupted possession of a pew in a church for the space of twenty years, affords presumptive evidence of a legal title by prescription or by a faculty, against a wrong doer (j).

This, however, it is to be remembered, is but a rule

(h) Vin. Ab. Ev. Q. a. pl. 8.

(i) *Holcroft v. Heel*, 1 B. & P. 400, where the enjoyment for twenty-three years seems to have been considered to be an absolute bar. It seems, however, to be now settled that the enjoyment operates as presumptive evidence only. See *Ld. Mansfield's* observations in the *Mayor of Kingston-upon-Hull v. Horner*, Cowp. 102. *Darwin v. Upton*, 2 W. Saund. 175. c.

(j) So held by Willes, J. as stated by him in *Darwin v. Upton*, 2 W. Saund. 175. c. But if the right be claimed by prescription, as appurtenant to an ancient messuage, the claim will be rebutted by proof that the pew began to exist within time of legal memory. *Griffith v. Matthews*, 5 T. R. 296. There the right was claimed as appurtenant to an ancient messuage; an enjoyment of thirty years was proved; but as it appeared that previous to that time it was an open seat, it was held, that the declaration was not supported by the evidence. In *Rogers v. Brooks*, 24 G. 3. 1 T. R. 431. n. the right to the pew was also claimed as appurtenant to an ancient messuage; a possession of thirty-six years was proved; but it appeared also that forty years ago the pew was an open one; and that the church having been rebuilt, the family under whom the plaintiff claimed were put into possession of the pew. Upon a motion for a new trial, after a verdict for the plaintiff, the Court seems to have considered, that there was evidence to show that the possession of the pew thus given was founded upon an ancient immemorial right, and was not a new gift, and the verdict was sustained. In the case of *Stocks v. Booth*, 1 T. R. 428, it was held, that evidence of possession of a pew for the space of sixty years was insufficient, the right not being claimed as appurtenant to a messuage by prescription, or under a faculty. But that decision seems to have turned entirely upon the form of pleading. See the observations of Buller, J. 5 T. R. 296.

The temporal courts cannot notice the disturbance of a pew in the body of the church but as an easement annexed to a messuage in the parish. *Mainwaring v. Giles*, 5 B. & A. 356. Pews do not become annexed to houses from mere occupancy. In country parishes the same pews are occupied by the same families for a long time, but they still belong to the parish at large; but repairs are evidence of annexation. Per Sir J. Nicholls, in *Petman v. Bridger*, 1 Phill. 325. But a possessory right is sufficient against a mere disturber; for the fact of possession implies the actual or virtual authority of those having power to place. The disturber must show that he has been placed there by authority. Per Sir J. Nicholls, *ib.* 324.

or presumption of evidence, according to which twenty years seem to constitute the *minimum* of continued *adverse enjoyment, from which *alone*, unconfirmed by any other circumstances, a legal title ought to be presumed. The presumption may be founded on a shorter period of enjoyment, if it be supported by confirmatory evidence; a longer period may be insufficient, if collateral circumstances tend to rebut the presumption (*k*).

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The very ground of the presumption in such cases is the difficulty of accounting for the possession and enjoyment, without presuming a grant or other lawful conveyance. Hence, notwithstanding a continuance of possession, far exceeding twenty years, if the original possession can be accounted for consistently with a title existing in another, it will be competent to the latter to rebut the presumption arising from the continuance of the possession (*j*).

How rebutted.

As the presumption of title is made in analogy to the statute of Limitations, 21 J. 1. c. 16, which takes away the right of entry after an adverse possession of twenty years, it seems, that any evidence which would under that statute show that the possession of the land was not adverse, so as to bar the entry of the lessor, would also be admissible to show that the enjoyment of the right was not adverse (*l*).

Thus the presumption of a grant of an incorporeal right, affecting the lands of another, may be rebutted, by proof that the exercise and enjoyment of the owner was acquiesced in, not by the owner of the inheritance, but by one who possessed a temporary interest only, such as a tenant for life, or years, whose negligence and laches cannot be allowed to *prejudice the owner of the inheritance (*m*). * 1218

(*k*) Per Ld. *Ellenborough*, C. J. in *Bealey v. Shaw*, 6 East, 214. *Darwin v. Upton*, 2 W. Saund. 175. b.; Mich. 26 G. 3, where the Court of K. B. held, that length of time was presumptive evidence only.

(*j*) Although right of common has been exercised for far more than twenty years, yet, if from the nature and circumstances of the enjoyment it does not appear to have been generally known to all those interested in opposing the right, it is a question for the Jury whether the enjoyment is to be referred to a right, or to encroachment. *Devereux v. Duke of Norfolk*, 1 Price, 247.

(*l*) Vide *supra*, 507.

(*m*) Thus, where *A.* being tenant for life, with power to make a jointure, which he afterwards executed, gave license to *B.* in 1747, to erect a weir on *A.*'s soil, for the purpose of watering *B.*'s meadows, and then *A.* died, and the jointress entered, and continued seised down to 1799, when an action being brought against the tenant of *A.*'s farm for diverting the water of the river, the Court of K. B. held, that the uninterrupted possession of the weir for so

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Or by proof, that, although the enjoyment was with the acquiescence of the owner of the inheritance, it was not *adverse*, but was with the leave and license of the owner of the soil, or was exercised under a mutual mistake (n).

The technical presumption necessarily assumes that it was practicable to transfer the right by means of a grant or other conveyance; hence, the presumption * does not operate, where such a grant could not, from the nature of the case, have been made. Such a presumption cannot, therefore, be made against an incumbent of a living, although the right has been enjoyed for twenty years through the laches of his predecessor, for the latter was incapable of making the grant (p).

Where, by a statute, it is essential to a conveyance that it should be made by bargain and sale, enrolled in Chancery, it will not, it seems, be presumed, even after long-continued enjoyment, that such a deed was enrolled, unless some foundation be laid for making such a presumption; as by proof that the rolls have been searched, and a chasm found corresponding with the date of the supposed conveyance (q).

many years, with the acquiescence of the particular tenants for life, did not affect him who had the inheritance in reversion. *Bradbury v. Grinsell*, Mich. 41 Geo. 3; 2 W. Saund. 175. d. And in *Daniel v. North*, 11 East, 370, it was held, that an enjoyment of lights for more than twenty years, during the occupation of the opposite premises by a tenant, did not preclude his landlord, who was ignorant of the fact, from disputing the right to the enjoyment of such lights. See also *Wood v. Veal*, 5 B. & A. 454.

(n) See *Campbell v. Wilson*, 3 East, 294. In that case, the road in question had been used by the defendant for more than twenty years, an award had been made about twenty-six years before the action, the operation of which was to extinguish all the ways then existing, except particular ways, not including the one in question. *Chambre, J.* observed to the Jury, that it was probable that the defendant's enjoyment of the way over the plaintiff's moss-dale after the award, originated in mistake; but that if they were satisfied that the enjoyment was adverse, and that it had continued for more than twenty years and upwards before the action, it was a sufficient ground for presuming a grant. The Jury found for the defendant; and upon motion for a new trial, it was objected, as a misdirection, that the Jury had been told that they ought to presume a grant, although they were of opinion that the user originated in mistake. The rule, however, was discharged, on the ground, it seems, that the real question had been substantially left to the Jury, there being no evidence to refer the use of the way to the award.

(p) *Barker v. Richardson*, 4 B. & A. 579.

(q) *Doe v. Waterton*, 3 B. & A. 149. The premises, which were copyhold, had been surrendered to the use of trustees, in trust for the poor of a town, and the trustees had been admitted under the

Where possession or usage has been of long duration, although it neither furnishes an absolute bar, nor operates virtually as such, in analogy to the Statutes of Limitations, yet such evidence is so far regarded and recognized by the Courts, that a practical efficacy is given to it, not wholly derived from its own natural weight, as estimated by a Jury, but partly from considerations of policy and convenience (r).

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surrender in 1743, and remained in possession till 1819. See also *Wright v. Smythies*, 10 East, 409. But see *R. v. Buckley*, 7 East, 45.

(r) Proof of long-continued possession does not in any case, except by the peremptory direction of a statute of limitations, operate as a bar, but merely as evidence of a legal commencement. In such cases, evidence of possession is of great weight; but there is no positive rule which says, that possession for one or two centuries, or any time within memory, shall be a sufficient ground for presuming a charter. In the case of a supposed bye-law, usage is evidence to support it, without the production of the original written law, or the loss of it. In all such cases, the presumption in favour of rights, of which the parties have been in long and peaceable possession, is founded upon principles of sound policy and convenience. Per *Ld. Mansfield*, Cowp. 110.

In *Read v. Brookman*, 3 T. R. 159, *Buller*, J. said, "For these last two hundred years it has been considered as clear law, that grants, letters patent, and records, may be presumed from length of time. It was so laid down in *Ld. Coke's* time, 12 Rep. 5, as undoubted law at that time, and in modern times has been adopted to its fullest extent." See 1 T. R. 399. n.—Where the mayor and aldermen of a corporation had for near a century acted as the trustees of a school, and received the rents and profits, it was held, that a charter might be presumed. *Barwick v. Thompson*, 7 T. R. 488.—Where long possession has accompanied a recovery, a surrender by the tenant for life will be presumed. 2 Saund. 42. a.

In *Biddulph v. Ather*, 2 Wils. 23, proof that the owners of an estate had enjoyed wrecks for the space of ninety-two years, was held to be strong evidence of right.

In *Hasselden v. Bradney*, 3 G. 3. C. B. cited by *Buller*, J. 3 T. R. 159, it was held, that a Jury might find a recovery on presumption; and see *Goodtitle d. Bridges v. Duke of Chandos*, 2 Burr. 1065; & *infra*, tit. *Recovery*. The production of an original lease for a long term and possession for seventy years, is evidence of an assignment. *Earl v. Baxter*, 2 Bl. Rep. 1288. So possession of land for twenty years, and evidence of a deed, purporting to assign an old term of two thousand years, is evidence of an original grant of that term. *Denn v. Barnard*, Cowp. 595.

In *Roe d. Johnson v. Ireland*, 11 East, 280, where a surrender had been made to churchwardens, and their successors, in the year 1636, without naming any rent; but in 1649 the Parliamentary Survey charged them with 6d. rent, under the head of Freehold Rents; and there was no evidence of any different rent having been paid since that time; and receipts had been given for it as for a freehold rent, by the stewards of the manor; it was held to be evidence on which the Jury might presume an enfranchisement, even against the Crown, although the manor had continued out in

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* It seems, however, to be generally true, that whenever the original possession on the part of the holder can be accounted for by the party who claims through an antecedent legal title, and there is no precise point of time at which a clearly adverse possession * commenced, however long the subsequent possession may have been, it is a mere question of fact for the Jury, under all the circumstances of the case, whether a conveyance has actually been made to the party so in possession (s) (1).

lease from before 1636 to 1804, although an old tablet of parochial benefactions, suspended in the church, noticed the surrender, but made no mention of any enfranchisement; and Ld. Ellenborough said, that he would presume any thing capable of being presumed, in order to support so long an enjoyment; and that as Ld. Kenyon had said, on a similar occasion, he would presume not only one, but a hundred grants, if they were necessary. See also *Lady Stafford v. Luellin*, Skinn. 77. *R. v. Carpenter*, 2 Show. 48.

(s) See *Doe d. Fenwick v. Read*, 5 B. & A. 232, *infra*, 1228, note (m).

(1) [Where M. died in possession of land, and his son and heir at law succeeded to the possession, and continued in the undisturbed possession of it for above eighteen years, it was held that a purchase of the title by the ancestor might be presumed. *Jackson v. McCall*, 10 Johns. 377. And where there was an order of the council of the colony of New York, in 1764, for the survey of the lot, as allotted to J. P., and a survey thereof made, though no patent could be found on record,—it was held that a patent to J. P. and a deed to him from the ancestor might be presumed for the sake of quieting the possession. *ibid.* So where an agreement for the sale and conveyance of a piece of land, dated in 1689, was produced in evidence, the jury were allowed, in 1809, to presume a conveyance pursuant to the agreement. *Jackson v. Murray*, 7 Johns. 5. Where the location of a patent or grant, executed nearly a century ago, comes in question, every presumption will be made against a party who neglected to have his land surveyed, and its boundaries accurately defined, or to make an actual location of them, at the time. *Jackson v. Schoonmaker*, 7 Johns. 12. Where a person might have claimed a conveyance from a devisee, by virtue of a trust contained in the deviser's will, and entered on the premises fifty years ago, and he and his heirs had had uninterrupted possession, as far as the lands were from their nature susceptible of possession, a deed is to be presumed. *Vanduyck v. Van Beuren & al.*, 1 Caines' Rep. 84. After a lapse of more than seventy years without any adverse claim, a jury may presume a grant from the original proprietor of a share in a township of land to a person afterwards constantly acting as grantee of such share, sustaining various offices as such in the corporation of proprietors, and paying taxes thereon; although such share consist of wild land, and be not held by any open visible possession. *Farrar & al. v. Merrill*, 1 Greenleaf, 17. See also *Grote v. Grote*, 10 Johns. 402. *Bergen v. Bennet*, 1 Caines' Cas. in Er. 1. *Archer v. Tanner*, 2 Hen. & Mun. 370.

A covenant in a deed by a tenant in tail, that he will suffer a fine

Although no one can prescribe against the Crown, the maxim being *nullum tempus occurrit regi*, yet after long-continued enjoyment a grant from the Crown may be presumed (2). After long-continued exercise of a right of advowson by the prior of Stonely, it was held, that a grant was to be presumed (1). For *that all should be presum-

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(1) *Bedle v. Beard*, 12 Co. 5. The church was appurtenant to the manor of Kimbolton, which manor, *cum pertinentibus* was granted by Edward the First to Humphrey de Bohun, in tail general. The latter granted it to the prior of Stonely and his successors, who held it till the dissolution of the monastery, 27 Hen. 8. The manor had descended to Edward Duke of Buckingham, and upon his attainder king Henry the Eighth granted the manor, with all advowsons, to Wingfield, and afterwards sold the rectory as inappropriate in fee; and the plaintiff claimed by mesne conveyance from the vendee. The defendant obtained a presentation from queen Elizabeth by lapse, pretending that the church was not lawfully appropriate to the priory, on the ground that the rectory did not pass to Humphrey de Bohun, under the description of *manerium cum pertinentibus*, and that at all events the grant by him, being tenant in tail only, enured but for his own life. But the Court held, that although the advowson did not pass by the grant of the king, under the words *cum pertinentibus*, yet that it should be intended in respect of the ancient and continued possession, that there was a lawful grant by the king to the said Humphrey; for that all should be presumed to have been solemnly done which might make the ancient appropriation good, although the grant could not be shown. And it was also said, that ancient possession would injure instead of strengthening a title, if, after a succession of ages, and the decease of the parties, objections should prevail which might have been answered in the lifetime of the parties, and which, if well founded, would have been

and recovery to bar the entail, and a long and continued possession for near thirty years under the deed of the tenant in tail (containing such a covenant) without acknowledgment, is not sufficient to support a presumption that such fine had been levied or recovery suffered. *Den v. M'Alister*, 2 Halsted's Rep. 46. A general usage, like that of depositing lumber on the bank of a river, not accompanied by a claim of title, or an intention to occupy the land to the exclusion of the owner's rights, cannot furnish any presumption of a grant. *Bethune v. Turner*, 1 Greenleaf, 111. In *Sumner v. Child*, 2 Conn. Rep. 607, it was held that a grant of lands, conferring an entire title, cannot be presumed from possession and length of time aloof. A grant of lands under navigable waters to the owners of the adjoining soil is not presumed without evidence of long exclusive possession and use. *Palmer v. Hicks*, 6 Johns. 133. See also *Wilson v. Stoner*, 9 Serg. & Rawle, 39.]

(2) [After a possession of land for ninety years in the midst of a thickly settled country, building a church on part of the land, and using it for public worship, and occupying part as a burial ground, a grant of the land from the Commonwealth, or at least of the right of preemption, will be presumed. *Mather v. Trinity Church*, 3 Serg. & Rawle. 509.]

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ed to have been solemnly done, which could make the ancient appropriation good, although the original grant could not be found.

Where the question was as to the right of advowson of a curacy under a deanery, formerly belonging to the collegiate church of Chester-le-street, but which came into the hands of the Crown at the Dissolution, and remained there till 16 Jac. 1, when the deanery was granted away by the Crown, with all advowsons, donations, &c., and no nomination or presentation by the Crown was proved since that time; but those claiming under the grant had enjoyed the nomination or appointment—the Jury found, under the direction of Ld. Mansfield, a grant of the advowson by the Crown, subsequent to the grant of the deanery (u).

Where it was proved that the corporation of Kingston-upon-Hull had (in 1774) been in possession and receipt of toll-dues on goods imported into the port of Hull, for the space of three hundred and thirty years, it was left to the Jury to presume a grant by the Crown of those duties, between the date of the charter, 5 Rich. 2d (1382), and the year 1441, when the enjoyment commenced, and the Jury found the grant (w).

In a case, in the Duchy Court, between the *King* and Mr. *Brown*, it was held, by Ld. Mansfield, that possession and enjoyment for one hundred years operated as evidence against the Crown for right in * the defendant, if the claim could have a legal commencement (x).

The law will, in many instances, found a presumption in fact, as to a legal title, upon other grounds than long-continued enjoyment.

The presumption of law is *omnia rite esse acta*, and upon this principle, wherever trustees are bound to convey an estate to the beneficial owner, it is to be presumed, for the sake of investing one who has the lawful possession, with the legal title, that they have done their duty (y).

sooner made. See the observations of Ld. *Mansfield* on the above case. Cowp. 109, 110; and in *Eldridge v. Knott*, Cowp. 215.

(u) *Powel v. Milbank*, 12 G. 3. B. R.; 1 T. R. 399, in the note. The curacy appeared to be a benefice with cure of souls, and the plaintiff not having been licensed, it was held that he could not maintain an action for money had and received against an intruder.

(w) *The Mayor of Kingston-upon-Hull v. Horner*, Cowp. 102.

(x) Cited by Ld. Mansfield, Cowp. 110. See also *Roe d. Johnson v. Ireland*, 11 East, 280; *supra*, 1220; Skinn. 78; Vin. Abr. Ev. Q. a. 2.

(y) See Ld. Ellenborough's observations in *Keene v. Deardon*, 8 East, 263.

In the case of *Lade v. Holford* (z), Ld. Mansfield said, that he and several of the Judges had resolved never to suffer a plaintiff in ejectment to be nonsuited by a term outstanding in his own trustee, or a satisfied term, to be set up by a mortgagor against a mortgagee, but direct the Jury to presume it to be surrendered (a). So a surrender of a satisfied term is to be presumed in favour of the owner of the inheritance, where it is his interest that the term should be considered as surrendered (b).

PART
IV.

Legal pre-
sumptions.

* But this is not a direct and immediate inference, to be made by the Courts, but by a Jury; and although the Court will, under certain circumstances, direct a Jury to presume an outstanding term to have been surrendered by the trustee, yet, if such a presumption be not made by the Jury it cannot be made by the Court (c).

* 1224

Presumption of
law.

(z) B. N. P. 110, cited in *Doe d. Bristow v. Pegge*, 1 T. R. 758, in note.

(a) Ld. Kenyon, in the case of *Doe v. Staple*, 2 T. R. 684; and *Doe v. Sybourn*, 7 T. R. 2, expressed his approbation of Ld. Mansfield's doctrine. In *England d. Sybourn v. Slade*, 4 T. R. 682, a father having devised lands to trustees, in trust to convey them to his son in fee, on his attaining the age of twenty-one; it was left to the Jury to presume that this had been done, although twenty years had not elapsed. See the next note.

(b) *Doe d. Burdett v. Wrightie*, 2 B. & A. 710. Where a term of one thousand years was created by deed in 1717, and in 1735 was assigned for the purpose of securing an annuity to A., and after that to attend the inheritance. A. having died in 1741, and the estate having remained undisturbed in the hands of the owner of the inheritance and her devisee from 1735 to 1813, without any notice having been in the mean time taken of the term, except that in 1801, the deviser, in whose possession the deeds creating and assigning it, were found, covenanted to produce those deeds when called for; it was held that the Jury were warranted, in an ejectment brought for the premises by the heir at law, to presume a surrender of the term.

In *Doe d. Bristow v. Pegge*, 25 G. 3. B. R.; 1 T. R. 758, in the note Ld. Mansfield said "I found this point settled before I came into this court, that the Court never suffers a mortgagor to set up the title of a third person against his mortgagee; for he made the mortgage, and it does not lie in his mouth to say so, though such third person might have a right to recover the possession. Nor shall a tenant, who has paid rent, and acted as such, ever set up a superior title of a third person against his lessor, in bar of an ejectment brought by him."

(c) See Ld. Kenyon's observations in *Goodtitle d. Jones v. Jones*, 7 T. R. 47; Mich. 1796. In that case, it was stated in the verdict that an old term created in the preceding century had been assigned from time to time, and was in existence in the year 1780.

If it would be the duty of a Judge to give a clear direction to the Jury in favour of a fact, it seems to be a rule in equity that the case is to be considered to be without reasonable doubt; but if a

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IV.Presumption
of law.

But a surrender of an outstanding term is not to be presumed where the purpose for which the term was created remains unsatisfied. Thus, an unsatisfied term, raised for the purpose of securing an annuity, cannot during the life of the annuitant be presumed to have been surrendered (*d*).

So, although as against a mortgagor who seeks to defeat the title of his mortgagee, a surrender of an outstanding term will be presumed, yet that presumption will not be made in favour of a prior mortgagee * against a subsequent mortgagee, in possession of the title deeds, without notice of the prior incumbrance (*e*).

And the law will not, in any case, raise such a presumption on a supposed breach of trust on the part of the trustees. Thus, where an estate was conveyed to trustees, in trust, to sell and to invest the money arising from the sale in the purchase of lands, to be settled to certain specified uses, but till the sale to permit *A.* to remain in possession, and to receive the rents and profits, *A.* having remained in possession for more than twenty years, it was held, on an ejectment brought by the trustees, that the possession of *A.* was not an adverse possession as against the trustees, and that no reconveyance by the trustees to *A.* could be presumed (*f*). And the Jury will not be directed to presume the surrender of a term to attend the inheritance against the interest of the owner. Thus, where an old mortgage-term of one thousand years was created in 1727, was recognized in a marriage settlement of the owner of the inheritance in 1751, by which a sum was appropriated to its discharge, and no further notice was taken of it till 1802, when a mortgage-deed, to which the owner of the inheritance, and the representatives of the termors, were parties, assigned it, as a security, it was held that a surrender could not be presumed (*g*).

Finally, it seems that an artificial presumption of this nature is not to be made gratuitously, merely because a term is satisfied, unless it be to answer some purpose of

Judge would be bound to leave it to a Jury to pronounce on the effect of the evidence, it is to be considered in equity as too doubtful to conclude a purchaser. *Emery v. Grocock*, 6 Mad. 54.

A surrender of a copyhold was presumed where a devisee of the copyhold had been admitted, and there had subsequently been two surrenders and admittances. *Wilson v. Allen*, 1 J. & W. 620.

(*d*) *Doe d. Hodaden v. Staple*, 2 T. R. 684.

(*e*) *Goodtitle d. Norris v. Morgan*, 1 T. R. 755.

(*f*) *Keene v. Deardon*, 8 East, 248.

(*g*) *Doe d. Graham v. Scott*, 11 East, 478, and *supra*, 1223, note (*b*).

justice (h). It is to be remembered, that the presumptions here spoken of are the mere artificial creatures of law, depending entirely on considerations * of legal policy and convenience; they are pure legal rules; the Jury being, for this purpose, mere passive instruments in the hands of the Court. Such presumptions differ, therefore, *toto calo*, from conclusions drawn by a Jury, when they determine according to the natural tendency and weight of the evidence; a distinction of importance, inasmuch as considerations of policy and convenience, which are the very source, and origin, and support of artificial presumptions have no application to conclusions as to actual matter of fact. It is obvious, that wherever a Jury is required to find, not according to their actual conviction of the truth, but in conformity with any considerations of policy, their finding resolves itself into a mere rule or presumption of law.

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IV.

* 1226
Presumption
of law.

It has been intimated, that the doctrine of legal presumptions ought not to be extended (i). This, however, is a matter of purely legal consideration. The practice of requiring Juries, in any case, to be mere passive instruments, in finding facts upon their oaths, in the existence of which the Court itself did not believe (k), although now established, is of singular origin. The effect is, indirectly, to establish an artificial presumption, which, for want either of inclination or authority, could not be established and applied directly. It seems to be very difficult to say, why such presumptions should not at once have been established as mere presumptions of law, to be applied to the facts by the Courts, without the aid of a Jury. That course would certainly have been more simple, and any objection, as to the want of authority, would apply with equal if not superior force to the establishing such presumptions indirectly through the medium of a Jury.

* *Thirdly*. Where the law raises no artificial presumption, but the Jury are left to make their own inference, according to the natural weight of the evidence.

* 1227
Circumstantial
evidence.

Although the enjoyment be of too short a duration to constitute either an absolute bar against one who claims under a legal title, or even to furnish any technical pre-

(h) See *Ld. Eldon's observations in Evans v. Bicknell*, 6 Ves. 184; and of *Ld. Ellenborough, C. J. in Doe d. Graham v. Scott*, 11 East, 478.

(i) See *Ld. Eldon's observations in 6 Ves. 184; 10 Ves. 259, and of Abbott, C. J. 5 B. & A. 216.*

(k) See *Ld. Mansfield's observations in Eldridge v. Knott*, Cowp. 214.

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sumption in fact, in favour of the right, it seems, that in all cases, a Jury may find a grant, conveyance, or release, on such cogent and legal though circumstantial evidence, as is sufficient to convince their minds that a grant or other conveyance, essential to the transfer, according to the nature of the property, has been actually executed (1).

* 1228
Presumption
in fact.

The nature of the evidence, tending indirectly * to prove a title, is too plain to require comment; it is, in such cases, obviously of the highest importance to account for the non-production of the supposed deed, either on the ground of probable loss, or destruction, of fraud, or spoliation, on the part of the adversary.

(1) See the observations of Ld. Ellenborough in *Bealey v. Shaw*, 6 East, 214; *Reeves v. Brymer*, 6 Ves. 516, and *Washington v. Brymer*, Peake's L. Ev. xxv, and *infra*, tit. Release. From which it appears, that, where a court of equity cannot infer a release from circumstantial evidence, yet, that it is competent to a Jury to find one upon precisely the same evidence. And in *Eden v. Smith*, 5 Ves. 341, a letter written by the obligee of a bond, to the mother of the obligor, in which he stated, that he had released the sum for which the bond was given, was held to be sufficient evidence of a release in equity, and the Lord Chancellor (Eldon) said, that if a release had been pleaded at law the latter would have been evidence of it. In *Eldridge v. Knott*, Cowp. 214, it was held, that although the release of a quit-rent could not be presumed in law from mere non-payment for a less term than the period fixed by the statute of Limitations (fifty years), yet that a release might have been inferred from such non-payment, accompanied with other circumstances which rendered it probable. And see tit. *Payment*, 1090. See also the case of *Doe d. Fenwick v. Reed*, 5 B. & A. 232; in which case, although Abbott, C. J. expressed an opinion, that the presumption of grants and conveyances had been carried too far, it was considered to be properly a mere question for the Jury, whether a conveyance in fact had actually been made. Indeed, the practice, which has prevailed from the earliest time of sanctioning the finding by a Jury of a title from long-continued possession, admits the principle, for such evidence is purely circumstantial, and may frequently be weaker than circumstantial evidence of a different description. In the *Trials per Pais*, 179, it is laid down, "the Jury may find deeds or matter of record, if they will, though not showed in evidence." Finch, 400. See also *supra*, 1216, 7. *Stone v. Grabham*, 1 Roll. R. 3. pl. 5.

Wood, B. in *Mead v. Norbury*, 2 Price, 351, said, "Lord Keeper Henley, in *Funshawe v. Rotheram*, 3 Gwill. 1179, says, "I would not be understood as if a judge would in all cases expect the production of the very deed or grant of exemption, but the best evidence the nature of the case will admit of; and this is certainly the true rule of law;" and see Lord Loughborough's observations, 5 Ves. 186, *Post*, tit. *Tithes*. In equity a surrender of a copyhold never made may be presumed from lapse of time. *Knight v. Adamson*, 2 Freem. 106. A grant is presumable in equity in case of encroachment of rent, after a lapse of twenty years, 2 Vern. 516; so a re-conveyance may be presumed. 12 Ves. 261.

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IV.Presumption
in fact.

Where the duration of enjoyment does not constitute an absolute bar, but furnishes a mere *prima facie* presumption of legal title, all the circumstances incident to the particular case are admissible, in order either to confirm or rebut such a presumption. And where the presumption is met by evidence, tending to explain such enjoyment, consistently with the legal existence of the adverse claim, it is for the Jury to decide upon the conflicting evidence as a pure question of fact. Thus, where the original possession by the party who has long continued in possession, is accounted for consistently with the continuance of a legal title in one who claims by virtue of a title antecedent to such possession, it becomes a mere question of fact, for the decision of the Jury, whether, under all the circumstances of the case, a conveyance has actually been made; or the continuance of the possession is to be attributed to laches and want of care on the part of the claimant (m).

(m) *Doe v. Fenwick v. Reed*, 5 B. & A. 232. *Rooke* having obtained judgment against *Charlton*, was, by agreement, in the year 1747, put into possession till the debt should be satisfied. In 1753 *Rooke* assigned the remainder of the debt and his right of possession to *Reed*, another creditor, under whom the defendant claimed. *Reed* and his family had continued in possession ever since. In 1801 a chancery suit had been commenced by the heir at law of the former owner to recover possession, and in 1820 the Vice-Chancellor directed the action to be brought, prohibiting the defendant from insisting that the debt due to *Reed* had been paid twenty years ago, or still remained unpaid. The title deeds (which extended to other estates also) remained in the hands of the *Charlton* family; the lands being copyhold, the name of *Rooke* had remained upon the manor-books till within a few years. Moduses had been paid by the steward of the *Charlton* family to the then rector of Simonburn in 1779, for some of the estates (amongst others) in question. *Edward Charlton* died in 1767, leaving a widow and a son, under age; the son, *William Charlton*, married in 1778, and died in 1797, leaving a son, an infant. Bayley, J. informed the Jury, that the real question for them to consider was, whether they believed that a conveyance had actually taken place, observing, that the loss of a deed of conveyance was less likely to take place, than of a grant of a right of way; and that during the marriages of *Edward* and of *William Charlton*, no conveyance could have been made without levying a fine, which being of record, might have been produced if it had existed. The Jury found for the lessor of the plaintiff. The Court refused a rule nisi for a new trial, which was moved for on the ground of misdirection. It was observed by the Court, that the original enjoyment was consistent with the fact of there being no conveyance, and that it was a question of fact for the Jury to say, whether the continuance in possession, though longer than was warranted by the original condition, was to be attributed to the want of care and attention on the part of the *Charlton* family, or to the fact of there having been a conveyance of the estate. That in cases of rights of way, the ori-

PART
IV.* 1229
Presumptive
evidence.

It has been doubted whether the doctrine of presumption, as to the execution of deeds of conveyance, * has not been carried to too great a length (*n*). The reasons however which have been urged on the subject, are properly applicable to *legal* and *artificial* presumptions only, that it is to such as are made by the Courts, either directly, or indirectly by means of a Jury, and not to such conclusions in fact as are made by a Jury upon a full conviction of the truth of * the fact, by the natural force of the evidence. To the weight and importance of circumstantial evidence to prove the actual execution of a conveyance, whose existence cannot be directly proved, there is no limit short of that which necessarily produces actual conviction; and there seems to be no rule of law which excludes such evidence from the consideration of a Jury; if there were, it would be a singular and anomalous one, which would shut out evidence of a nature and description which is admissible in every other case, however important the consequences, even upon trials for murder and treason. Juries are bound to decide according to the actual truth of the fact; they are to do this, it has been seen, even in cases where a party, and even the Court, would be bound by an estoppel (*o*); it would therefore be absurd and inconsistent to say that a Jury was not to be allowed to find according to the real fact, where they were satisfied that an actual conveyance had been executed. In an action of ejectment, for instance, how could they find a verdict for *A.*, when they were satisfied from the evidence that he had assigned, released, or otherwise conveyed his right to *B.* The *dicta* and *decisions* to be found on the subject, as well as legal analogies and natural reason, tend to the conclusion that the Jury are, in this case, as in all others, to find, according to their conscientious conviction, the truth of the fact. Mere *artificial* presumptions ought, no doubt, for reasons which will be adverted to (*p*), to be confined within due limits: where such a presumption operates, the inference is an arbitrary one, drawn from a few facts, and

ginal enjoyment cannot be accounted for unless a grant has been made; and hence such grants after long-continued enjoyment are to be presumed; but that in the present case the original enjoyment had been accounted for.

(*n*) See the observations in *Doe d. Fenwick v. Reed*, 5 B. & A. 232. See also *Ld. Eldon's* observations in *Evans v. Bicknell*, 6 Ves. 174.

(*o*) Vol. I. p. 303.

(*p*) See *tit. Presumption*. See also *Isaac v. Clarke*, 1 Roll. R. 132. pl. 9; Vin. Ab. Ev. Q. a.

is by no means necessarily true, but usually rests on grounds of legal policy and convenience. But to a *Jury, who are in possession of all the circumstances of the case, and are, at the peril of their oaths, to decide according to the real truth as collected from all the evidence, a far greater latitude may reasonably be given (o): they, from the very extensive nature of the trust committed to them, are limited in the discharge of that duty by no boundaries, except those of truth and actual fact, which they are always bound to find, according to their conscientious conviction and persuasion, derived from the evidence, without regarding consequences, and unfettered by extraneous considerations of policy and convenience. If this be so, it follows, that however impolitic and inconvenient it may be to extend the limits of artificial presumptions, such objections have no weight, or rather, are wholly inapplicable to conclusions drawn by a Jury from legal evidence, although circumstantial in its nature, tending to the proof of the facts so inferred. It can never be contended, that they are in no instance to be allowed to infer the execution of a deed from circumstantial evidence; such evidence frequently acts with an almost irresistible degree of force, such as no rational mind can withstand. But if this be once admitted the principle must extend to all cases where there is legal evidence tending to the proof. No intermediate limits can, consistently with principle, be interposed; it is the peculiar province of the Jury to estimate the weight and effect of evidence.

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evidence.
* 1231

Reasons of policy and convenience are the very foundation upon which all artificial presumptions are built, and the utility and propriety of such presumptions, and the extent to which they ought to prevail, whether as conclusive on the subject-matter, or merely till proof be adduced to the contrary, are mere matters *of legal consideration. But from these, the conclusions of the fact, drawn by a Jury from circumstantial evidence, differ most widely and essentially in this as well as other respects, inasmuch as jurors are bound by their oath to decide according to the real truth, without regard to consequences; and it is clear, upon principle, that their functions can never be properly limited by any considerations of mere policy and convenience (p), whatever may be the legal effect of the facts when found.

* 1232

(o) A Jury, it has been seen, may draw a conclusion from circumstantial evidence, where even a court of equity cannot. *Reeves v. Brymer*, 6 Ves. 516; *supra*, 1227, note (l).

(p) These observations have been introduced, in order that ob
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jections to the doctrine of mere artificial or legal presumptions may not be applied to conclusions made by a Jury from circumstantial evidence.

In the case of *Doe d. Putland v. Hilder*, 2 B. & A. 782, the title of the lessor of the plaintiff was founded on a judgment, recovered in the year 1808, against *Richard Newman*, for 8,000*l.*, and a writ of elegit and inquisition thereon in 1818. On the part of the defendant it appeared, that in 1762 the premises had been mortgaged for a term of one thousand years by *Naylor*, and that in 1799 the mortgage was discharged, and the term assigned to *William Denman*, in trust for *John Newman*, a purchaser of the premises to attend the inheritance. In 1814, *Richard Newman*, to whom the premises had descended from the purchaser, executed a marriage settlement, and in 1816 conveyed the premises to *Sarah Newman* his mother, as a security for 1162*l.*, which was due from him to her. But no assignment of the term or delivery of the deeds took place on either occasion. Mrs. *Newman* died in 1817, and in 1819 an assignment was made by the administrator of the trustee of the term in 1799, to a trustee, in trust for the devisees of Mrs. *Newman*. The Jury, under the direction of the learned Judge who tried the cause, presumed a surrender of the term, and the Court of K. B. afterwards refused to disturb the verdict, on the ground, as it appears, that the circumstantial evidence warranted such a finding in fact.

Upon this case, Mr. *Sugden* (in his letter to *Charles Butler*, Esq. on the doctrine of presuming a surrender of terms, assigned to attend the inheritance, 1819,) has very rightly urged, that in such a case the possession of the *cestuy que trust* being consistent with the existence of the term in the trustee, no presumption, as from an adverse and continued possession, ever arises. This argument seems fully to prove, that a surrender, in such a case, is not to be presumed from mere lapse of time. But it is to be * observed, that the Court, in refusing a new trial, did not refuse it upon that ground, but relied principally on the force of the circumstantial evidence to prove a surrender in fact. The subsequent arguments (so well urged by Mr. *Sugden*) are founded principally upon considerations of policy and convenience, which, although they may be entitled to the greatest consideration, where the question is, whether a legal presumption ought to be established in such cases, are entitled to none, or rather are wholly inapplicable, where the conclusion is one of actual fact derived by a Jury. The very mention of the proposition is absurd, that a Jury, who are bound by their oath to pronounce according to the evidence, should decide contrary to their solemn conviction, on any collateral suggestion of convenience; as, for instance, because a purchaser is a *favourite*, either in a court of law or equity. If it be admitted that in the case of *Doe v. Hilder* no legal presumption of a surrender resulted from lapse of time, still, in such a case, where there is circumstantial evidence derived from the ordinary course of practice, as well as from the *res gesta* of the individual case, it is a question of fact for the Jury, whether such an assignment has been actually executed or not. If, in such a case, it appeared that such an uniform course of dealing and practice prevailed as is suggested by Mr. *Sugden*, it would afford a strong ground for the Jury to find, in point of fact, in the absence of any reason for supposing the contrary, that such ordinary course and practice had been adopted and followed in the particular instance; but this, it is obvious, is mere *matter of evidence*, to be found and acted upon, not by the Court, but by the

* PRESUMPTIONS.

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IV.

EVIDENCE, as has been seen, is either *direct*, where the witnesses testify as to facts, of which they have had actual knowledge; or it is indirect, circumstantial, or presumptive (*a*), where the fact is not proved by direct evidence, but is deduced or inferred from one or more other facts, which are directly proved or admitted.

Presumptive
evidence.

According to this definition, circumstantial or presumptive evidence includes all evidence which is not positive and direct, without regard to its nature, intensity, and degree; whether the fact in issue be a necessary consequence from the circumstances proved, or whether, on the other hand, their tendency to establish the fact may be rebutted by proof to the contrary; whether the inference be made by virtue of some previously known and ascertained connection between the disputed fact and those which are proved, or be a mere deduction of reason, exercised upon the special circumstances of the case, independently of the aid of connections pointed out by experience.

A *presumption* may be defined to be an inference as to the existence of one fact, from the existence of some other fact, founded upon a previous experience of their connection. To constitute such a presumption, a previous * experience of the connection between the known and inferred facts is essential, of such a nature, that as soon as the existence of the one is established, admitted, or assumed, the inference as to the existence of the other immediately arises, independently of any reasoning upon the subject. It also follows from the above definition, that the inference may be either *certain* or not certain, but

Presumptions.

* 1235

Jury. In the late case of *Doe d. Fenwick v. Reed*, which has already been adverted to, the great distinction between a legal presumption, founded upon mere length of possession, and on a finding by the Jury that a conveyance had actually been made, was acted upon by the Court; and it was held, that no legal presumption of a conveyance could be properly founded upon a long-continued possession, the origin of which had been accounted for; but that it had been properly left to the Jury to say, whether, under all the circumstances of the case, a conveyance had actually been executed or not.

(*a*) The term *presumptive* has been used in this sense by English lawyers in contradistinction to positive and direct evidence, and consequently as including all evidence whatsoever arising from circumstances, whether conclusive or inconclusive in its nature. See Co. Litt. 6; Staundf. 179; 2 Haw. c. 45. s. 10; 1 St. Tr. 181. Lord Coke, when he speaks of violent, probable, and light presumptions (Co. Litt. 6,) evidently means, not presumptions in their strict technical sense, but presumptive or circumstantial evidence.

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presumptions.

merely *probable*, and therefore capable of being rebutted by proof to the contrary (b).

Presumptions thus defined are either *legal and artificial*, or *natural*. They are artificial, or presumptions of law whenever they derive from the law any technical or artificial operation and effect, beyond their mere natural tendency to produce belief, and operate uniformly, without applying the process of reasoning on which they are founded to the circumstances of the particular case. They are, on the other hand, *natural*, where they act merely by virtue of their own natural efficacy. For instance, whenever a particular presumption arises from the lapse of a defined space of time, it is always in its nature artificial; for the evidence, when left to its own natural weight, is not confined within arbitrary and artificial boundaries. Thus, at * 1236 the expiration of twenty years, * without payment of interest on a bond, or other acknowledgment of its existence, satisfaction is to be presumed; but if a single day less than twenty years has elapsed, the presumption of satisfaction from mere lapse of time does not arise. This is obviously an artificial and arbitrary distinction. No man's mind is so constituted that the mere lapse of the single day, which completes the twenty years, would absolutely generate in it a conviction or belief that the debt had been satisfied. But again; satisfaction may be inferred from the lapse of a shorter period, if it be rendered probable by other circumstances; for instance, from the lapse of nineteen years; here the lapse of time is to be taken into the account by the Jury in estimating the probability, whether, under all the circumstances, the debt has not been satisfied. Here, however, the lapse of time possesses no *artificial* or arbitrary operation, but is left to its mere *natural* tendency, to convince the minds of the Jury that the debt has been satisfied (c).

(b) According to some writers, the term presumption is not strictly applicable where the inference is a necessary one, and absolutely conclusive, as where it is founded on the certain and invariable course of nature. See Evans's Pothier. If any practical advantage could be derived from this distinction, in thus limiting the meaning of the term, it would be proper so to use it, and to apply the more general term *inference* to all such inferences as are in their nature absolute and conclusive. Such a distinction appears however to be an unnecessary one; and it may be well doubted whether the distinction itself be founded on sound principles. The Roman lawyers used the term in the more extensive sense. Their *presumptio juris et de jure* was conclusive. L. 3. L. 9. ff. lib. 22, tit. 2. Heinccc. ad Pand. part 4, s. 122, 3, 4.

(c) As artificial or legal presumptions are founded partly upon principles of policy and utility, independently of the real existence

* *Artificial* or legal presumptions are also of two kinds, immediate and mediate. Immediate, are those

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of the fact inferred ; and consequently, as such presumptions must occasionally, at least, be made contrary to the real truth, it follows, that these presumptions cannot, consistently with just principles, be established, unless either the real fact be immaterial, as where the presumption is made merely for the purpose of annexing a legal consequence to the fact on which the presumption is founded ; or where the fact to be presumed being material, but its investigation difficult and remote, a general rule of presumption can be established of practical convenience, and consistent with justice, although it may occasionally operate contrary to the truth. In the first place, presumptions are frequently made for the mere purpose of annexing a legal incident to a particular predicament of fact. If the fact *B.*, to which a particular legal consequence is annexed, be absolutely or conditionally presumed from the existence of the fact *A.*, it is obvious that the effect is to annex to the fact *A.* the legal consequence which belongs to *B.* The making such presumptions, and thus annexing legal consequences, is an indirect mode of legislation ; and in estimating the legal value of such a presumption it is plain, that the intermediate or presumed fact may be left out of the account ; the question is, whether a legal consequence be well connected with a particular predicament in fact ; in other words, whether a rule of law be wisely constituted. Thus, if from the adverse possession of an incorporeal interest in the lands of another, unanswered, a grant is to be presumed, the effect is to annex ownership as an incident to such adverse possession unanswered ; for the supposed grant is mere fiction, or legal machinery, and the only question is, whether the legal consequences really incident to a valid grant are well annexed to such a state of facts.—Again, in trover, a conversion of the plaintiff's property is to be inferred by a Jury, from the fact of a demand by the owner, and refusal on the part of the defendant who is in possession of it, such refusal being unexplained. Here the predicament on which the presumption is built renders the fact presumed in reality immaterial, where the defendant wilfully withholds the plaintiff's property ; it is of no importance to the real justice of the case, as between the parties, to what use the defendant may have applied the property, whether he has consumed the goods, or allowed them to perish in the course of nature. The effect in such cases is merely to annex to one fact a legal incident annexed by law to another fact, to which the former is in all respects equivalent. Such presumptions are also well founded in principle where the investigation of a fact is difficult and precarious, and where a general rule of practical utility can be established, without occasioning positive injustice in individual instances. Within this principle, all statutes of limitation, and the presumptions made in analogy to them, are founded. All these, either absolutely, or, provided there be no proof to the contrary, substitute the lapse of some definite period of time for proof of the fact. The difficulty of proving a debt constantly increases with lapse of time, and may at last become impossible ; whilst, on the other hand, the probability that he who makes no claim of payment or possession has a right to make it, continually diminishes. Convenience, therefore, requires that at some period or other the presumption should be made, either absolutely or otherwise, against the anti-

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* which are made by the law itself, directly, and without the aid of a Jury. Mediate presumptions are those

quoted claim. And as such a rule or presumption must be general in its operation, a precise and definite period must of course be appointed for its operation. The great advantages of this in point of policy and convenience are of the most obvious nature. The operation of such a rule, whether it be absolute, or be but a *prima facie* presumption, being purely artificial in its nature, may be, it is true, contrary to the fact; but of this, a party who knew the rule, and who suffers therefore merely from his own laches, has no just ground for complaint. So by the stat. 1 Jac. 1. c. 11, s. 2; 19 C. 2. c. 6, a person who has been abroad for the space of seven years, and has not been heard of within that time, is, at the expiration of it, presumed to be dead. A rule of convenience, on account of the difficulty of proving the death of a person under such circumstances, and attended with no positive injustice in any individual case, the presumption operating only in the absence of proof to the contrary. On the same principle were founded the decisions of the Roman law in those nice cases which sometimes happen, where it is impossible, with any approach to certainty, to decide which of two persons, who died very nearly at the same time, survived the other, Cum bello pater cum filio periisset, materque filii quasi postea mortui bona vindicaret, agnati vero patris quasi filius antea periisset, divus Hadrianus credidit patrem prius esse mortuum. L. 9, § 1. ff. de reb. dub. And again, Mulier naufragio cum anniculo filio periit, quia verisimile videbatur ante matrem infantem perisse, virum partem dotis retinere placuit. L. 16. ff. de pac. dot. Where the father and son were hanged in the same cart, and the question was, whether the wife of the son was entitled to dower, the Jury found upon the evidence that the son survived the father; for it appeared that he struggled the longest.

A question of the same nature occurred when General Stanwix and his daughter were lost in the same ship; cited in *R. v. Dr. Kay*, 1 Bl. R. 640. And see *Cro. Eliz.* 503; 2 Comm. 132. *Wright v. Netherwood*, 2 Salk. 593, note by Evans. *Taylor v. Diplock*, 2 Philimore, 261. In such cases a general rule is preferable to laborious investigation in each individual case, where the result must always be subject to doubt and uncertainty.

It has been said, that the presumption of the law is better than that of man (*Esprit des Loix*, l. 29. c. 16). A position much too large, if it be not limited to general rules of the nature above alluded to. For artificial presumptions, although beneficial, as general and practical rules, are usually very uncertain and precarious instruments for the investigation of truth in particular instances; they are, therefore, unfit to be employed where any application of the law, contrary to the real fact, would be attended with positive injustice, as in criminal cases. Where facts are not necessarily connected, the connecting them by means of artificial presumptions leads to error in fact. Where facts are necessarily or usually connected, technical presumptions are unnecessary; the common sense and experience of mankind will lead them to the proper conclusions, giving to such natural presumptions such weight as experience warrants, confirmed as they are on the one hand, or impeached on the other, by the whole context of circumstances belonging to the case.

* which cannot be made but by the aid of a Jury. Thus the law itself presumes that a bond, or other *specialty,

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It is also to be observed that presumptions which tend to the actual investigation of such facts as are usually the subject of litigation in courts of justice, are of a very general nature, and seldom, if ever, conclusive. Thus presumptions, and strong ones, are constantly founded on a knowledge of mankind; a man's motives are inferred from his acts, and his conduct from the motives by which he was known to be influenced; it is presumed, that a rational agent intended that consequence which his acts naturally tend to accomplish; that he consults his own interests; that if he pays or acknowledges a debt, it is really due; that if he admits himself to be guilty of a crime, the admission is true; that he does not commit a crime, or do any other act which tends to his prejudice, without a motive.

* 1240

Presumptions of this nature, in almost every case of circumstantial evidence, afford a light which may be considered to be absolutely essential to the discovery of truth; but then they operate simply by their own intrinsic efficacy, as ascertained by experience, and never so conclusively as to form the basis of an artificial rule which is to operate invariably. All presumptions are founded in experience; but so infinitely are the transactions of mankind complicated and varied, that such an experience of the necessary or even ordinary connexion between particular facts as will serve for the basis of a *prima facie* presumption, still less of a conclusive inference, is unattainable, even in the most simple instances. So far is experience from warranting such presumptions, that it evinces their inefficacy by showing that a general presumption would frequently be a fallacious one. There is no subject for presumption of more ordinary occurrence than is afforded by the prisoner's recent possession of stolen goods, in a case of larceny; no facts, perhaps, are more closely and usually combined, in legal experience, than is the fact of such recent possession of the property by the prisoner, with the fact that he stole it; yet this connexion, although usual, is by no means necessary, as experience proves; no artificial presumption can therefore be founded on such a connexion; the law, it is true, recognizes it, and the Judge usually comments upon its nature and force; but no *artificial* weight or importance is annexed to it, and the Jury do not convict unless they be fully satisfied and convinced of the actual guilt of the prisoner. Artificial presumptions, therefore, can never be safely established as a means of proof in a criminal case. To convict an innocent man is an act of positive injustice, which, according to one of the best and most humane principles of our law, cannot be expiated by the conviction of an hundred criminals, who might otherwise have escaped, 4 Comm. 352; 2 Hale, 289. From such presumptions the common law is justly most abhorrent; and happily our statute-book has not been disgraced by many violations of the humane principles of the common law in this respect. The abominable and sanguinary enactment of the statute of James the First (21 Jac. I. c. 27), which made the concealment of a bastard child by the mother, evidence that she murdered it, no longer exists. But it is impossible, without a feeling of indignation, to recollect that such a statute did exist as the law of this country for nearly two centuries; the natural effect of which was to leave a Court and Jury no other alternative than either to violate their

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was made upon a good consideration ; but the law cannot presume, from the lapse of twenty years, without any payment of interest on a bond, or acknowledgment of its existence, that it has been satisfied ; the presumption is to be left to a Jury. Presumptions may therefore be divided (*d*) into three * classes : 1st. Legal presumptions made by the law itself, or presumptions of *mere law*. 2dly. *Legal* presumptions to be made by a Jury, or presumptions of *law and fact*. 3dly. *Mere natural* presumptions, or presumptions of *mere fact*.

Of mere law.

First. Presumptions of *mere law*, then, are artificial presumptions, made by the law itself, without the aid of a Jury. These, again, are either, 1st. Absolute and conclusive, which correspond with the *presumptiones juris et de jure* of the Roman law. Or, 2dly. Like the *presumptiones juris* of the Roman law may be rebutted by evidence to the contrary. Thus, the presumption of law, that a bond or other specialty was executed upon a good consideration, cannot be rebutted by evidence (*e*) ; but, although the law also presumes, or intends that a bill of exchange was accepted on a good consideration, that presumption may be rebutted by proof to the contrary.

Artificial presumptions, made by the law itself, are not

oaths, or to execute one for murder whom in their consciences they believed to be innocent. The enactment of the statute 45 Geo. III. c. 89. s. 6, which makes the having a forged Bank note in possession, knowing it to be forged, without lawful excuse, felony ; but which provides also, that proof of the excuse shall lie upon the person accused, is a law, which, whatever may be said for it on the score of necessity, is contrary to the humane spirit and just principles of the common law, and is liable to the objections which have been above adverted to, inasmuch as it raises an artificial presumption of guilt, which may, or may not consist with the real truth, and consequently in its technical and peremptory operation tends to convict the innocent as well as the guilty.

(*d*) So according to the Roman law "*Præsumptio conjectura est ducta ab eo quod ut plurimum fit. L. 3. L. 9. L. 12. Ff. h. t. Ea vel a Lege inducitur vel a Judice. Quæ ab ipsa lege inducitur, vel ita comparata, ut probationem contrarii haud admittat, vel ut eadem possit elidi. Priorem doctores presumptionem juris et de jure adpellant. Quæ a judice inducitur conjectura, præsumptio hominis vocari solet, et semper admittit probationem contrarii, quamvis si alicujus momenti sit, probandi onere relevet.*" Heineccius ad Pand. Pt. 4. s. 124. Ff. Lib. 22. tit. 2.

(*e*) *Lowe v. Peers*, 4 Burr. 225 ; i. e. so long as the deed remains unimpeached ; a bond or other specialty may be directly impeached, on the ground of fraud, and then the consideration may become the subject of inquiry ; but whilst the legal existence of the deed stands admitted, the presumption of a good consideration is peremptory and absolute.

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in general used as rules of evidence for the purpose of ascertaining doubted facts, but are, in effect, mere arbitrary rules of law, which, according to the policy of the law, operate in some instances conclusively, and which in other instances again, where a peremptory and absolute operation would be attended with inconvenience, may be answered and rebutted: The connection between mere natural facts cannot be known but from actual observation and experience; *but purely artificial relations, such as legal incidents and consequences, the mere creatures of positive law, may be indissolubly tied and connected together by the rules of law. A law, or rule of law, consists in nothing more than the connecting of certain consequences with particular defined predicaments of fact. When, therefore, the law presumes or infers any fact to which a legal consequence is annexed, from any defined predicament of facts, the law in effect indirectly annexes to that predicament the legal consequence which belongs to the presumed fact (e).

* 1242

Again; in many instances presumptions of law are but *prima facie* inferences or *intendments*, made by the courts, liable to be rebutted by proof to the contrary. Thus the law will intend, or imply, that the heir at law of an ancestor, who died seised of an estate, was in possession (f); or where a fine has been levied, will imply that it has been levied with proclamations (g). Or that the examination of a prisoner, under the statute of Philip and Mary, has been taken in writing (h), until the contrary of these facts be proved. Presumptions of this nature may be rebutted not only by evidence to the contrary, but also by contrary presumptions or intendments of law. Thus on an indictment for the non-repair of a road, the presumption that an award in relief of the defendants was duly made according to the directions of an inclosure act, may be rebutted by proof of repairs subsequently done to the road by the defendants (i). But the presumption in favour of innocence is, it has been held, too strong to be overcome by an artificial intendment of law (k).

(e) *Supra*, 1236. note (c).

(f) *Watkins on Descents*, ch. I. p. 38.

(g) 3 Co. 86. b. *Watkins on Descents*. But if the intendment be rebutted, proclamations must be proved, in order to bar a stranger. B. N. F. 229.

(h) *Supra*, 51.

(i) *R. v. Inhabitants of Haslingfield*, 2 M. & S. 558.

(k) *R. v. Twynning*, 2 B. & A. 386; *infra*, 1249.

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fact.

* Secondly. Presumptions of *law and fact*.—These are also artificial presumptions which are recognized and warranted by the law as the proper inferences to be made by Juries under particular circumstances. These are also founded partly upon principles of policy and convenience, and frequently in analogy to express rules of law ; and for this purpose a technical force and efficacy is given to the evidence which warrants such presumptions, beyond its mere natural tendency to convince the mind. Two incidents are essential to presumptions of this class, 1st, The inference cannot be made by the Court, but ought to be made by the Jury. 2dly, The inference is never conclusive.

Presumptions, therefore, of this kind, are very closely allied to those artificial presumptions which are made by the law itself, but which are in their nature inconclusive, that is, to the *presumptiones juris* of the Roman law (*k*). They are of a class intermediate between mere artificial presumptions made by the law itself, and mere natural presumptions, which are to be made exclusively by a Jury. They may, therefore, not improperly, be called mixed presumptions, or presumptions of *law and fact*, partaking of the nature of mere *legal* presumptions, in this respect, that they are artificial, and of the nature of mere *natural* presumptions, inasmuch as they must be made, not by the Court, but by a Jury. The principle and origin of this class of presumptions are usually not remote ; they are for the most part instruments in the hands of the Courts, by which positive statutes, or rules of law, are extended by analogy to cases which do not fall within their express legal operation, or by means of which effect is given to rules of evident policy and convenience, which cannot be applied directly (*l*).

* 1244

Thus a Jury is *required, or at least advised, by a Court, to infer a grant of an incorporeal hereditament after an adverse enjoyment for the space of twenty years unanswerd (1). This is done in analogy to the Statute of Limitations, 21 Jac. 1. for as an adverse possession of twenty years is sufficient to confer a title to the

(*k*) *Supra*, 1240, note (*d*).

(*l*) For instances of the latter description, *vide supra*, 1238, in the note.

(1) [In *Stoever v. Lessee of Whitman*, 6 Binney, 418, it is held that what circumstances will justify the presumption of a deed, is matter of law ; and that it is the duty of the court to give an opinion whether the facts proved will justify the presumption. See also *Young v. Collins*, 2 Browne's Rep. 292.]

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possession of the land itself, *a fortiori*, it ought to confer a right to an interest arising out of the land; but the Statute of Limitations does not extend to this case, and therefore the benefit and convenience of such a limitation is obtained indirectly by thus raising an artificial presumption (*m*) (2). Presumptions of this nature, which depend merely on acquiescence for a specific and definite period of time, of arbitrary appointment, are most obviously artificial; their operation may depend on the lapse of a few hours, more or less (*n*).

So in the case of trover; an unqualified refusal to deliver up the goods on demand made by the owner does not fall within any definition of a conversion, but inasmuch as the detention is attended with all the evils of a conversion to the owner, the law makes it, in its effects and consequences, equivalent to a conversion, by directing or advising the Jury to infer a conversion from the facts of demand and refusal.

Thirdly, natural presumptions, or presumptions of mere fact.—These depend upon their own natural force and efficacy in generating belief or conviction in the mind, as derived from those connections which are pointed out by experience; they are wholly independent * of any artificial legal relations and connections, and differ from presumptions of mere law in this essential respect, that those depend upon, or rather are, a branch of the particular system of jurisprudence to which they belong; but mere natural presumptions are derived wholly by means of the common experience of mankind, from the course of nature, and the ordinary habits of society. Such presumptions are therefore wholly independent of the system of laws to be applied to the facts when established; they remain the same in their nature and operation, whether the law of England, or the code of Justinian, is to decide upon the legal effect and quality of the facts when found. * 1245

Many presumptions of this class are recognized by the law, and therefore, in one sense, may be termed legal pre-

(*m*) The presumption that a bond has been satisfied after the expiration of twenty years from the time when interest has been paid, or other acknowledgment made of its existence, is built on the same principle. *Vide supra*, 310. 1090. [Vol. I. 311, *note*.] And see *Searle v. Lord Barrington*, 2 Str. 826; 2 Ld. Raym. 1370. *Turner v. Crisp*, 2 Str. 827. *Moreland v. Bennett*, 1 Str. 652. *Washington v. Brymer*, Peake's L. E. App. *supra*, 1291.

(*n*) See the observations *supra*, p. 1235, 6.

(2) [See *Supra*, 1221, *note* (1).]

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sumptions.

sumptions; which still, unless some degree of technical force and weight be given them beyond their mere natural operation, are properly to be ranked in this class. Recent possession of stolen goods, on a trial for larceny, is recognized by the law as affording a presumption of guilt; and therefore, in one sense, is a presumption of law, but it is still, in effect, a mere natural presumption; for although the circumstance may weigh greatly with a Jury, it is to operate solely by its own natural force, for a Jury are not to convict on this or on any other charge, unless they be actually convinced in their consciences of the truth of the fact. Such a presumption is therefore essentially different from the legal presumptions in fact lately adverted to, where the Jury are to infer that a bond has, or has not, been satisfied, as a few days or even hours, more or less, have elapsed, as the twenty years are expiring.

Although it be the peculiar province of a Jury to deal with presumptions of this description, and to make such
 * 1246 inferences as their experience warrants, yet in * some instances where particular facts are inseparably connected according to the usual course and order of nature, and the interposition of a Jury would be nugatory, the Courts themselves will draw the inference. Thus on a question of bastardy, where the child has been born within a few weeks after the access of the husband, the bastardy of the child will be inferred without the aid of a Jury (o).

Presumptions of this nature, are, as has already been observed, co-extensive with the experience of mankind; there is in fact, no relation whatsoever, whether natural or artificial, which is subject to human observation, which may not be proved where such proof is material, in a Court of Justice, by the testimony of those who have had experience of that relation.

A mere *presumption*, in the proper and technical sense of the word, is much more limited in its nature than presumptive or circumstantial evidence in general. A presumption, strictly speaking, results from a previous, known, and ascertained connection between the presumed fact, and the fact from which the inference is made, without the intervention of any act of reason in the individual instance; on the other hand, circumstantial evidence, that is, indirect evidence to prove a fact, may depend wholly on a process of reasoning applied to the facts of the particular case, although the mind may never have experienced such a combination before. The instance put by Lord Coke (p), of

(o) *R. v. Luffe*, 8 East, 193.

(p) *Co. Litt.* 6.

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what he terms a violent presumption is, in reality, a case of indirect or circumstantial evidence, but not properly a presumption in the strict sense of the word, because the inference results from an act of reason, exercised upon the facts, and not upon any known and ascertained relations. The instance which he gives of a violent presumption is this; "where a man is found suddenly dead in a room, and * another is found running out of that room with a bloody sword in his hand." It is plain that in such a case conviction is wrought by an exercise of the reason upon the circumstances, (however small the effort) by which the mind, upon the slightest reflection, excludes all guilty agents but one; the excluding force and nature of the circumstances generate conviction by negating, to the satisfaction of the mind, the agency of any individual but one. It is evident that a witness who had never seen such a transaction before would as readily come to the proper conclusion as one who had actually had experience of similar facts; and consequently that reason, and not any previous experience of similar associations, supplies the inference. * 1247

In practice, however, it rarely happens that some natural presumption, properly so called, does not co-operate with the exercise of reason on the particular circumstances to produce conviction. And on the other hand, those transactions which are the subject of judicial inquiry, and indeed all human dealings, present such an infinite variety of circumstances, that experience alone, however essential and important, as undoubtedly it is, in supplying inferences which *tend* to the general conclusion, can rarely simply, and alone, without the aid of sound reason and discretion, exercised upon all the circumstances, warrant a conclusion. It follows, that further remarks on mere natural presumptions belong properly to the head of *circumstantial evidence* (n).

It seems to be a general rule, that wherever there is evidence on which a Jury have founded a presumption according to the justice of the case, the Courts will not grant a new trial (o). In an action on a promissory note, given * 1248

(n) See Part III.

(o) *Wilkinson v. Payne*, 4 T. R. 468. Lord Kenyon, in that case, said the rule was carried so far that he remembered an instance of it bordering on the ridiculous; where, in an action on the game laws, it was suggested that the gun with which the defendant fired was not charged with shot, but that the bird might have died in consequence of fright; and the Jury having found for the defendant, the Court refused to grant a new trial. See also *Standen v.*

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to the plaintiff by the defendant, in consideration of the plaintiff's marrying his daughter; the defence was that the marriage was not a legal one, the plaintiff having married the daughter when he was under age, and without the consent of his parents or guardian. It also appeared, that when the plaintiff came of age, the wife was lying on her death-bed, and that she died in three weeks afterwards. The Jury nevertheless presumed a subsequent legal marriage, and the Court afterwards refused to set aside the verdict. Many of the presumptions which are recognised by the law are noticed under the particular subject of evidence, to which they belong (*p*), it may, however, be proper to advert to some of the most general.

The law of England, as well as the civil law, presumes against fraud, "*odiosa et inhonesta non sunt in lege præsumenda, et in facto quod in se habet et bonum et malum, magis de bono quam de malo præsumendum est*" (*q*). Thus the law always presumes in favour of innocence, as that a man's character is good until the contrary appear, or that he is innocent of an offence imputed to him till his guilt be proved. Where a woman married again within the space of * twelve months after her husband had left the country, the presumption of innocence was held to preponderate, over the usual presumption of the continuance of life (*r*).

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Standen, cited 4 T. R. 469. Where a marriage was presumed, although there was strong evidence to show that there had not been time enough for a publication of banns three times. It may, however, be very questionable whether such decisions are not contrary to sound policy. Do they not afford temptation to Juries, in hard cases, to trifle with the sacred obligation of an oath?

(*p*) See tit. *Intention, Prescription, Custom*.

(*q*) 10 Co. 56.

(*r*) *R. v. Twyning*, 2 B. & A. 386; and see *Williams v. The East India Company*, 3 East, 192; and *R. v. Hawkins*, 10 East, 211, where the Jury having found that a candidate for a corporate office at the time of election declared that he had taken the sacrament within the year, and the allegation not having been negatived by the verdict the Court held, that it was to be presumed that he had so received the sacrament. In *Powell v. Milburn*, 3 Wils. 355; 2 Bl. Rep. 851. upon the trial of an action for money had and received, in order to try the plaintiff's right to a donative, it was held that it was unnecessary for him to prove at the trial, although called upon to do so, that he had subscribed the articles of the church, in the presence of the ordinary, or publicly read the same, or that he had subscribed the declaration of uniformity contained in the stat. 13 & 14 Car. II. c. 4. And the case of *Monke v. Butler*, 1 Roll R. 83, was cited as a strong one; Monke sued for tithes; the defendant pleaded that the plaintiff had not read the articles according to the statute, and the Court constrained the defendant to

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And in general, where a person is required to do an act, the omission to do which would be criminal, his * performance of that act will be intended until the contrary be shown (s). And, therefore, where a plaintiff alleged in his declaration, that the defendants, who were the charterers of his ship, had put on board a very dangerous and combustible commodity, (in consequence of which a loss happened) without giving due notice to the captain or other person employed in the navigation of the vessel, it was held to be incumbent on the plaintiff to prove his averment (t). But when an act, which in its nature is criminal, has once been proved, the law frequently infers malice, and requires exculpatory proof from the party. Thus, in case of homicide, after proof that the prisoner killed the deceased, the law will presume malice, until the prisoner justify, or extenuate the act (u). So, if a man hold a market near to the legal market of another, and on the same day, the former will be intended to be a nuisance (x).

It is also a maxim of law, in principle nearly allied to the former, that “omnia præsumuntur rite et solenniter esse acta, donec probetur in contrarium.” (1) Thus it will

Omnia rite
esse acta.

prove the negative; and Coke said that if such a matter should come before him in evidence, he would presume, until the contrary should be proved, that the plaintiff had read the articles. And in Clayton's Rep. Pleas of Assize, fol. 48, A. D. 1636, where the plaintiff sued for tithes under the statute Ed. 6, it was held that the plaintiff should not be put to prove admission, institution and induction; and that if it was otherwise the defendant might prove it. And in ejectment by a rector or vicar, it is not necessary to prove that he was in orders, for, according to Lord Holt, having established his temporal title, his religious or political title was to be presumed (Dr. Hasker's case, Comb. 202). Upon an information against Lord Halifax for not delivering up the rolls of the auditor of the Court of Exchequer, the Court put the plaintiff on proof of the negative, for a person shall be presumed to execute his office till the contrary appears (B. N. P. 298. Vin. Ab. tit. Evidence), and in *R. v. Coombs*, Comb. 57, the defendant having sworn an affirmative for which an information was filed against him, the Court directed that the prosecutor should first give probable evidence of the negative, and that the defendant should afterwards prove the affirmative, if he could.

(s) 3 East, 192, and per Lord Ellenborough, *R. v. Inhabitants of Hastingfield*, 2 M. & S. 558.

(t) *Williams v. The East India Company*, 3 East, 192.

(u) Fost. 256; *supra*, 948.

(x) 2 Will. Saund. 175. F. N. B. 184. 11 H. 4. 5.

(1) {After a lapse of 20 years from the partition of land among proprietors, it will be presumed that the advertisements, &c. were legal, if possession has in general conformed to the doings of the

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esse acta.

be presumed that a man who has acted in a public office or situation was duly appointed (y).

Upon proof of title, every thing which is collateral to the title will be intended, without proof; for although the law requires exactness in the derivation of a title, yet when that has once been proved, all collateral circumstances will be presumed in favour of right (z).

- * 1251 If therefore a man declare upon a grant or feoffment, at-
tornment will be intended (a); even although * a deed be
essential to such collateral matter *ex institutione hominis*,
for this is but the private act of the parties, and is not al-
lowed to control the judgment of the law, which intends all
collateral matters (b). But it is otherwise, although the
matter be but collateral, if a deed be essential to such col-
lateral matter *ex institutione legis* (c).

So where one who suffered a recovery had power to do

(y) *Supra*, 373. *R. v. Verelst*, 3 Camp. 432. It is to be presu-
med that the signatures in parish registers are those of rectors,
whose duty it was to sign them. *Taylor v. Cooke*, 8 Price, 653.

(z) 6 Co. 38.

(a) 1b. and Cro. Eliz. 401.

(b) 6 Co. 38. Bac. Ab. Ev. 639.

(c) *Ibid*.

meeting. *Society for propagating the Gospel v. Young*, 2 N. Hamp.
Rep. 310. In an action wherein the validity of a collector's deed,
upon a sale of land for taxes, thirty years before, was drawn in
question, it was held that upon proof that the collector was chosen
and sworn, and that tax bills, signed by certain persons as asses-
sors, were committed to him, the jury might presume that all the
proceedings were legal. *Pejepscut Proprietors v. Ransom*, 14 Mass.
Rep. 145. *S. P. Blossom v. Cannon*, 14 Mass. Rep. 177. See also
Colman & al. v. Anderson, 10 Mass. Rep. 105.

Where a will was proved 20 years before a suit was brought in
which the validity of the probate was questioned—by the oath of two
only of the subscribing witnesses, without accounting for the absence
of the third, and without any record of previous notice to the heirs—
the legal presumption is that sufficient reasons existed for the ab-
sence of the third witness, and that notice to the heirs was duly
given. *Brown & al. v. Wood & ux.* 17 Mass. Rep. 72.

See *Inhabts. of Sutton v. Inhabts. of Uxbridge*, 2 Pick. 436, where
it was held, that no presumption could be admitted that a re-
turn of a warrant (under st. 4 W. & M. c. 13, for warning a person
to leave a town) was made in conformity with the provisions of the
statute—the only evidence of the warrant and return being an en-
try in the records of the Court of Sessions, that the person had
“been duly warned, as by a warrant, &c. and return thereon on
file appears.” This decision seems to have been made, on the
ground (partly at least) that an inspection of similar warrants and
returns, at that early period, shows that the proceedings were often
very irregular and defective.]

it, it will be presumed that it was done with all the legal requisites (*d*). So it is always inferred that the records of a court of justice have been correctly made (*e*), and that the decisions of a Court of competent jurisdiction are well founded (*f*). Upon the same principle, the Courts, after verdict, will presume that facts, without proof of which the verdict could not have been found, were proved, although they were not alleged (*g*); where an order of bastardy purports to have been made on the evidence of the mother, who is a married woman, and on *other* evidence, the Court, in support of the order, will intend that the other evidence was legal evidence (*h*). So it will be presumed, till the contrary be shown, that a child born in wedlock is legitimate; for the maxim of law is, "Pater is est quem nuptiæ demonstrant" (*i*).

But notwithstanding the general presumption, omnia rite esse acta, positive proof may still be necessary if any counter presumption be raised by the circumstances. Thus, where the inhabitants of Haslingfield, * in defence of an indictment against them for not repairing a highway, gave in evidence an award by commissioners under an Inclosure Act, made sixteen or seventeen years ago, by which they awarded that the highway was not within the parish, but it appeared that the defendants had repaired it ever since, it was held that the usage raised a presumption that proper notices had not been given according to the act (*k*).

Some of the most important presumptions, founded on lapse of time and length of enjoyment, have already been considered (*l*). Where the existence of a particular subject-matter, or relation, has once been proved, its continuance is presumed till proof be given to the contrary, or till a different presumption be afforded by the very nature of the subject-matter (*m*). Thus, it is to be presumed, within

From time.

Continuance.

(*d*) 2 Saund. 42. (7), *infra*, tit. *Recovery*.

(*e*) *Read v. Jackson*, 1 East, 355.

(*f*) *Supra*, Vol. I. sec. lvii. *Res judicata pro veritate accipitur*, L. 207. ff. de reg. jur.

(*g*) *Spieres v. Parker*, 1 T. R. 141. *R. v. Twynning*, 2 B. & A. 386.

(*h*) *R. v. Bedell*, Andr. 8.

(*i*) *Supra*, tit. *Bastardy*.

(*k*) *R. v. Inhab. of Haslingfield*, 2 M. & S. 558.

(*l*) *Supra*, tit. *Prescription*.

(*m*) See Lord Ellenborough's observations in *Doe v. Palmer*, 16 East, 55.

PART
IV.Presumptions
of continuance.

certain limits, that a person once proved to have existed still exists (n). This presumption, it has been seen, ceases at the expiration of seven years from the time when the person was last known to be living (o) (1). So where two or more have been proved to be partners, it is to be presumed that the partnership afterwards subsists, unless the contrary be shown (p). Upon an indictment for a libel against Lord St. Vincent, as first lord of the admiralty, after proof of his appointment by patent *previous* to the publishing of the libel, it was held to be evidence that he was so at the time of publication, and that proof of the determination of the appointment lay on the defendant (q).

* 1253

Conduct.

* Most important presumptions are derived from the conduct of parties, both in civil and criminal proceedings. If circumstances induce a strong suspicion of guilt, and if the accused might, if he were innocent, explain those circumstances consistently with his own innocence, and yet does not offer such explanation, a strong natural presumption arises that he is guilty. And in general, where a party has the means in his power of rebutting and explaining the evidence adduced against him, if it does not tend to the truth, the omission to do so furnishes a forcible inference against him.

Presumptions from a man's conduct operate, as has been seen, in the nature of admissions; for, as against himself, it is to be presumed that a man's actions and representations correspond with the truth (r). These are in all cases evidence of the fact; and where the party has induced another to act on the faith of such representations, and where he cannot show the contrary, without being guilty of a breach of good faith and common honesty, such representations are usually not barely evidence of the fact, but are absolutely conclusive (s).

Common expe-
rience.

Numerous and most important presumptions are founded merely on the common and ordinary experience of man-

(n) 2 Roll Rep. 461.

(o) *Supra*, 457; and see the stat. 19 C. 2. c. 6, as to leasees for lives, and the stat. 6 Ann. c. 18.

(p) *Supra*, 1078.

(q) *R. v. Budd*, 5 Esp. C. 230; *R. v. Tanner*, 1 Esp. C. 304.

(r) *Supra*, tit. *Admissions*.

(s) *Supra*, 31. If A. rent lands of B., the incumbent of a living, and pay him rent, he cannot show in defence of an action for use and occupation that the presentation was simoniacal. *Cooke v. Lexley*, 5 T. R. 4.

(1) [See *Miller & al. v. Beates*, 3 Serg. & Rawle, 490. *King v. Paddock*, 18 Johns. 141.]

kind, as, that a man will not pay a debt which is not due (t); or acknowledge the existence of a debt to which he is not liable. That every man *contemplates and intends the natural consequence of his act (u).

PART
IV.

* 1254

Course of
dealing.

Many again are derived from the course and habit of dealing in a particular trade or business; as that the parties intended to contract according to the usual course of dealing (x).

It would, however, be a vain endeavour to attempt to specify the numerous presumptions with which the knowledge of a Jury, conversant in the common affairs and course of dealing in society, necessarily supplies them; it is obvious that such presumptions are co-extensive with the common experience and observation of mankind (y).

* PRIVILEGE OF COPYRIGHT, &c.

* 1255

In an action under the stat. 17 G. 3. c. 47, for pirating a print, it is sufficient to produce a print struck from the original plate, without producing the plate itself (a). An allegation that the plaintiff is the true and legal proprietor, is satisfied by evidence of an assignment from the original owner (b). But as an assignment of a copyright must be in writing, it is not sufficient for the plaintiff, in an action under the stat. 8 Anne, c. 19, to prove a parol agreement between himself and the author, according to which the plaintiff is to enjoy the exclusive publication in England (c). But a declaration by the plaintiff that he has parted with all his copyright, is evidence, as against him, that he has parted with it by legal and competent means (d). But the mere fact, that for many years before the action the defendant had published the work with the knowledge and acquiescence of the plaintiff, is merely evidence that the defendant had at that time authority to

(t) *Presumptionem pro eo esse qui accepit nemo dubitat, qui enim solvit nunquam ita resupinus est ut facile suas pecunias jactet et indebitas effundat.* L. 25. ff. de probat.

(u) *Supra*, 454, 5.

(x) *Supra*, tit. *Custom*, p. 453.

(y) For other observations connected with the subject, see Part III.

(a) *Thompson v. Symonds*, 5 T. R. 41.

(b) *Ibid.* and see *Sayer v. Dacey*, 3 Wils. 60.

(c) *Power v. Walker*, 4 Camp. 8; and 3 M. & S. 7.

(d) *Moore v. Walker*, 4 Camp. 9. n.

PART
IV.

publish, but it is no evidence of an actual transfer by the plaintiff to the defendant (e).

* 1256

* QUARE IMPEDIT.

In the proceeding by Quare Impedit (a) issue is usually taken on a traverse of some fact essential to the plaintiff's title, as alleged in the declaration.

Title.

Where the title is put in issue, the plaintiff must prove at least one presentation by himself, or those from whom he derives his title, and the institution and induction of the clerk so presented.

If it be probable that the defendant means to give evidence to show a title in himself, it becomes a matter of prudence to prove the exercise of the right of presentation in as many instances as possible.

Presentation.

Where the presentation has been made in writing, the document should be produced and proved; but as a presentation by parol is sufficient in law, such presentation may be proved by parol (b).

Where a blank was left in the bishop's register-book of presentations for the name of the patron, it was held that the omission might be supplied by parol (c).

The letters of institution should also be produced and proved. Where they have been lost, the bishop's register is evidence.

Induction.

The *induction* may be proved by any witness who was present at the time.

If the defendant plead only the general issue, i. e. that he did not disturb, &c. the title does not come in question; * 1257 the plaintiff either has judgment, or proceeds * for damages for the disturbance; in that case, he must prove the presentation, the bishop's refusal, and the institution or presentation of the other clerk (d).

(e) *Latour v. Bland*, 2 Starkie's C. 382. It was also held, that proof that the plaintiff had ten years ago given a receipt to the defendant for a sum of money, as the consideration for the transfer of the copyright, was not evidence of a transfer; *sed quare*.

(a) By the common law, there were three writs for the church itself; viz. Right of advowson, Quare Impedit, and Assise of Darrein Presentment. 2 Inst. 357. The writ of Quare Impedit lies by him who being in possession of an advowson is disturbed in his presentation. 2 Inst. 356; Com. Dig. Quare Impedit, D.

(b) *Bishop of Meath v. Lord Belfield*, 1 Wils. 215; *supra*, 1055.

(c) *Ibid*.

(d) See Peake's Ev. 438. 5th edit.

Where issue is taken upon the avoidance (*e*), the fact of avoidance is alone material, and a variance as to the manner of the avoidance is unimportant.

PART
IV.

Proof of an avoidance by taking another living without a dispensation (*e*), or by privation, is sufficient, although an avoidance by death be alleged (*f*). Avoidance.

Where the avoidance arises from the acceptance of another living, proof of the clerk's subscription to the articles, after his appointment to the second benefice, is essential to the proof of avoidance; evidence of institution and induction to the second benefice is alone insufficient. Such subscription may, nevertheless, it seems, be presumed from circumstances, such as his having officiated as parson of the second benefice. The first living will still be void, although, after subscribing to the articles on his appointment, the party neglect to read them within two months after his induction.

Curacies augmented by Queen Anne's bounty are by the stat. 36 Geo. 3. c. 83. s. 3, to be considered as benefices presentative, so that the license thereto shall operate in the same manner as an institution to such * benefices, and shall * 1258 render voidable other livings in like manner as institution to such benefices. Where, therefore, it is insisted, that a living has been avoided by the acceptance of such a curacy, proof must be given that the curacy has been augmented (*g*).

Where proof of a dispensation is necessary, the retainer, as chaplain, must be proved by the production of the document, and by the testimony of the subscribing witness, as in ordinary cases; and it seems that a copy of it entered in the Court of Faculties is not in itself sufficient (*h*).

In a case of an avoidance by deprivation or resignation, the ordinary, in proof of his title by lapse, must prove notice of the fact to the patron; but in case of an avoidance

(*e*) By the stat. 21 H. 8. c. 13. s. 9, if any person having one benefice with cure of souls, of the yearly value of *£*l. accept and take any other with cure of souls, and be instituted and inducted in possession of the same, the first benefice shall be adjudged void. If the benefice be under *£*l. a year, the first is void by the canon law. Burn's Ecc. Law, tit. Avoidance. And the patron may take notice and present. But no lapse will occur without notice, until six months after induction, and that only in cases within the statute. Hob. 166; B. N. P. 125.

(*f*) Dyer, 377. b. Co. Litt. 182. a.

(*g*) As to proof of augmentation, see *Doe d. Graham v. Scott*, 11 East, 478; and *supra*, 136.

(*h*) Litt. R. 1; Peake's Law Ev. 439. 5th edit.

PART
IV.Qualification
of presentee.

by death, no notice is necessary (i). The computation is by calendar, not lunar, months, and the day the church became void is to be taken into the account (k).

The bishop is the sole judge of the fitness of the party presented, and may in his discretion reject him if he be illiterate. And if the right of nominating be in A., and the right of presentation be in B., the latter may exercise the same discretion that a bishop may do (l). But if the presentee be rejected on the score of immorality, the fact is to be tried by a Jury (m).

If the Jury find for the plaintiff, they are to inquire (n), 1st. Whether the church be full; and 2dly. If so, upon whose presentation; for if upon the defendant's presentation, the clerk is removable. * 3dly. How long since it was void. 4thly. The yearly value of the living, to enable them to assess damages according to the statute of Westminster 2, c. 5 (o).

Defendant's
evidence.

If the defendant's clerk has been refused admission, he must be prepared with evidence, not only to controvert the plaintiff, by showing that the former presentation was an usurpation on his right, but must also be prepared with such evidence to support his own title as was necessary on the part of the plaintiff, for in this case both are actors (p).

QUO WARRANTO.

THE evidence necessary upon the trial of a *quo warranto* information must of course depend upon the particular issues joined (a).

(i) By 13 Eliz. c. 12; B. N. P. 124; Keilw. 49. b.

(k) 2 Inst. 311; B. N. P. 125.

(l) *The King against The Marquis of Stafford*, 3 T. R. 646.

(m) *Ibid.*

(n) By the stat. Westm. 2, c. 5, if six months pass by the disturbance of any, so that the bishop do confer to the church, and the very patron loseth his presentation for that time, damages shall be awarded to two years value of the church; and if six months be not passed, but the presentation be deraigned within the said time, then damages shall be awarded to the half year's value of the church. An usurpation cannot be avoided but by a writ brought *infra tempus semestris*, and no damages are recoverable when the church remains void. B. N. P. 123; Peake's Ev. 440. 5th. edit. where it is observed, that these are seldom matters of dispute in the suit, but that, unless they be admitted, the plaintiff ought to be prepared with evidence to ascertain them.

(o) B. N. P. 123.

(p) Hob. 163; Vaughan, 6.

(a) Not guilty, and non usurpavit. are, from the very nature of

If a bye-law be pleaded and issue taken thereon, proof that from the time of the supposed bye-law the usage at elections has been according to such supposed law, affords presumptive evidence that there was such a law, although it cannot be produced (b).

PART
IV.

Proof of
Bye-Law.

* Whether a corporation has accepted a new charter or not, is usually matter of evidence ; proof of their having acted under it is evidence of acceptance (c).

* 1260
Acceptance of
Charter.

In the case of the king against the vice-chancellor of the University of Cambridge (d), it was observed by Lord Mansfield, in giving judgment, that there was a vast deal of difference between a new charter granted to a new corporation, who must take it as it is given, and a new charter given to a corporation already in being, and acting either under a former charter or * under prescriptive usage ; the latter, or corporation already existing, are not obliged to accept the new charter *in toto* ; they may act partly under

* 1261

the charge, bad pleas ; the defendant must either justify or disclaim. B. N. P. 211.

(b) When the election of mayor, aldermen, &c. is by charter given to the commonalty, or burgesses at large, the corporation may, to avoid popular confusion, make a bye-law to restrain the power of election to a select number ; and though there be no such bye-law to be found, yet constant usage will be proof that there was such a one, and the Court will intend it. Therefore, it is in daily practice to plead such supposed bye-law to an information, as made at a particular time, and then, upon issue joined thereon, to support it by proving that the elections have been, for about that time, agreeable to such supposed bye-law. B. N. P. 211. 4 Co. 78 ; and per Lord Mansfield, Cowp. 110. But no bye-law can limit the class out of which such officers are by charter to be chosen. B. N. P. 211. *R. v. Phillips*, 1749 ; for that it would be prejudicial to the corporation.

(c) B. N. P. 212. Comb. 316. In the case of *The King v. Amery*, 1 T. R. 367, Lord Mansfield observed, "the great question is as to the acceptance of the charter of Car. 2. but that cannot involve in it much difficulty. We know the obloquy that charters granted at that time lie under ; as my Lord Hardwicke said, they have never received any countenance in Westminster Hall ; and he would never give any opinion in support of them, unless the strongest evidence was laid before the Court of their having been accepted and uniformly acted under ; therefore there is no ground in this case for a trial at bar." And see *R. v. Larwood*, 1 Salk. 167, where Holt, C. J. held, that although the corporation of Norwich might have used a charter of king C. 2. either as a new grant, or confirmation of their former charter, (for the king could not resume an interest which he had already granted,) yet that having made their elections according to the new charter, it was evidence of their consent to accept it as a grant.

(d) 3 Burr. 1647. See the observations of Lord Mansfield, C. J. and of Wilmot, J. in *R. v. Amery*, 1 T. R. 367.

PART
IV.

Variance.

it, and partly under their old charter or prescription; and the extent to which an old corporation has accepted the terms of a new charter is to be decided by practice and usage (e).

Where the plea alleged that a court-leet was holden immemorially, part in the morning and part in the evening, and that the custom had been to elect the mayor at the morning court, and that he had been accustomed to be sworn in at the evening court by the steward or his deputy, issue having been taken on the mode of election, and also on the mayor's being duly sworn, it appeared at the trial that it had been also the custom for the leet jury to present in writing the candidates who had most votes at the morning court, but that they had no control over the poll; it was held that this was a merely ministerial act on their part, and that it needed not to be alleged as part of the custom (f).

Evidence to
impeach the
title.

Where issue is taken upon the fact, whether *A. B.* was mayor at the time of the defendant's election, the question, whether he was mayor or not *de jure*, is put in issue, and evidence is admissible to show that he was not mayor *de jure*, although he was mayor *de facto* (g). But the contrary had been ruled * in a former case, where the mayor having died long before his title was impeached, it was held that proof of his being mayor *de facto* was conclusive evidence as to the right (h).

* 1262

Although it be held, in general, that the person elected must take upon himself to support the right and title of his

(e) 3 Burr. 1647.

(f) *R. v. Rowland*, 3 B. & A. 130.

(g) *R. v. W. Smith*, 5 M. & S. 271. And see *R. v. Lisle*, 2 Str. 1090; Andr. 163; in order to constitute a man an officer *de facto*, there must be at least the form of an election, although that, upon legal objections, may afterwards fall to the ground; a mere acting upon usurpation is not sufficient, *Ib.* and see *R. v. Malden*, 4 Burr. 2135, 2140, and *Foot v. Prowse*, 1 Str. 625. *R. v. Hebden*, 2 Str. 1109. Andr. 388. *R. v. Grimes*, 5 Burr. 2598. *R. v. Smart*, 4 Burr. 2241; *R. v. Harding*, cited in *R. v. Mayor, &c. of Shrewsbury*. Cas. Temp. Hardw. 150.

(h) *R. v. Spearing*, Winch. Sp. Ass. Cor. Blackstone, J. 1771. 1 T. R. 4, in *not.* The only material issue was, that the Duke of Bolton was not mayor of Winchester, for he was not an inhabitant at the time he was chosen, nor for sometime before, and so not eligible. Blackstone, J. would not suffer the parties to go into evidence at that distance of time after the death of the duke of Bolton, to prove him not an inhabitant, but merely whether he was mayor, or not, which the book showed; that is, he would not suffer the title to be impeached after the death of the person from whom it was derived. As he had in fact been mayor, it should be taken that he was regularly so.

electors, as in the election of aldermen of the city, coroners, members of parliament, &c. (i), yet for the sake, as it seems, of convenience, a distinction has been made in cases where the right of election depends upon corporate franchises. It has been said to be a general rule, founded on principles of justice and convenience, that upon a *quo warranto* against particular members, the prosecutor cannot go into evidence to impeach the titles of other corporators *de facto*, being electors (1).

* It is said that one who is not a party to the record is * 1263
a competent witness, although he has acted under the au- Competency.
thority of the custom which he comes to prove, and has, if the custom does not exist, acted illegally; Lord Hardwicke in giving judgment in the case of *The King v. Bray (k)*, observed, that it was every * day's experience, * 1264

(i) *Symmers et al. v. The King*, in error, Cowp. 489. The issue was on the replication, that the defendants were not elected in manner and form aforesaid; and upon the trial the Judge (in Ireland) refused to go into evidence offered by the defendants, to show that fifteen persons who had been elected, and who had acted as corporators for a number of years, were not inhabitants, &c. and had not resided for one whole year before their respective elections; and (as is said), such titles cannot be impeached collaterally, even although notice be given of the intention to do so. *Ib.* see *Strode v. Palmer*, Lilly's Ent. 248.; *Tuiston v. Nevinsion*, 2 Lord Raym. 1354; but Lord Ellenborough, C. J. in *R. v. Smith*, 5 M. & S. 271, observed, that the language of Lord Hardwicke in *Symmers v. Regem*, was very strong, and that if the case then before the Court had turned upon it he should have desired further time for consideration.

(k) *R. v. Gray*, Sel. N. P. 1087, and by the name of *R. v. Bray*, Rep. Temp. Hardw. 358. An information was brought against the defendant to show by what authority he claimed to be mayor of Tintagel; the question was, as to the existence of an alleged custom, that at a court-leet within the town the old mayor elected one elisor, and the town-clerk another; and in case the town-clerk refused it, or was absent, then the mayor chose both the elisors, which elisors nominated the jury who were to elect the mayor for the subsequent year. There were also informations against James Hoskins, for exercising the office of elisor, and another against Pascho Hoskins, for exercising the powers of a juror in that corporation. Upon the trial of the information against the mayor, an issue having been taken on the validity of the custom, James Hos-

(1) [An information in nature of a *quo warranto* need not show a title in the people to the particular franchise, but it lies on the defendant to show by what authority he claims it. *The People v. Utica Insurance Company*, 15 Johns. 358. On such information against a person claiming to exercise the office of sheriff, the decision of the managers of the election is conclusive as to all matters legally submitted to them, as long as that decision remains unreversed. *The State v. Delisseline*, 1 M'Cord, 52.]

PART
IV.

Competency.

that persons who have formerly executed offices in a corporation are produced to prove what they did when they were in office, and what has been usually done in their time, although in all such cases these officers have been liable to be punished by information, for their unlawful acts, the statute of limitations not extending to informations *quo warranto*, and yet such witnesses have been always allowed as the best evidence. In the same case Lord Hardwicke seemed also to consider that such testimony was also admissible on the ground of *necessity*; he observes, "Wherever any unlawful act is done in a corporate assembly, the whole assembly is liable to be punished by informations, and yet the persons who were present at such assemblies are always allowed to be good witnesses, and if they were not allowed there would be no evidence as to such acts at all" (l).

kings and Pascho Hoskins were called to prove the custom, but their testimony was rejected, on the ground that they were called to support a custom which they were concerned in interest to maintain. A new trial was afterwards granted, on the ground that these witnesses had been improperly rejected. Lord Hardwicke, in delivering the judgment of the Court, stated, that as to the objection, that James Pascho derived his own authority from the custom, the answer was, that his authority was ended; his claim was not that of an office or franchise, but a bare authority, for he was only an elisor chosen by the corporation for the purpose of returning a jury to choose a mayor, and that is not an office, but an authority, constituted for a particular purpose; and that as to the second objection, which was the most material one, that he was liable to be punished for a wrong exercise of his power, the objection went rather to credit than competency; and his Lordship said, that he did not know of any case in which it had been held that a man was an incompetent witness because he was possibly liable to be punished in an information in nature of a *quo warranto*, for a past act, the lawfulness of which he may probably support by the testimony he is about to give in another action to which he is not a party.

(l) It may be doubted whether the reasons alleged in support of this decision be strictly sufficient to warrant it in principle, without resorting to the plea of necessity. His Lordship referred to the case in Roll. Ab. 685. pl. 3. 2 Hale, 280. Where three defendants in three several actions for perjury in the same suit in Chancery, were held to be competent witnesses for each other. But there the verdict for one would be no evidence in favour of another, whereas the very gist of the objection in the principal case is, that the record of the action would be evidence for the witness himself to protect him from punishment. It is difficult to distinguish the case in principle from that of indictments against a principal and accessory in case of felony. The accessory would not be a competent witness for the former, inasmuch as the record of conviction would be evidence against himself, and a record of acquittal would conclusively discharge him. The case cited by his Lordship (*Champion*

A judgment of ouster against one corporator is, as has already been seen, evidence against another who * claims his title through the former (m). In such a case, however, the effect of the judgment may be repelled by * 1265 proof of fraud or neglect (n).

PART
IV.

Corporation books being of a public nature, copies of them are admissible in evidence (o); consequently the Court will not enforce the production of the original books unless an inspection be necessary, on the ground of an erasure, new entry, or other circumstance, which renders an inspection of the original necessary (p). The Court, upon a rule to show cause, will grant a rule for the inspection of books belonging to a corporation (q).

Corporation
books.

* RAPE.

* 1266

Assuming it to be necessary to prove both the *penetratio corporis et emissio seminis* (a), the latter fact may be proved by means of presumptive evidence.

v. *Atkinson*, 3 Keb. 90; *supra*, 745), where the steward of a manor was held to be a competent witness to prove a custom to pay a fine on the death of the lord, although the establishment of the action might render a readmission necessary, and so entitle him to a fee, seems to have proceeded on the ground that the nature of the interest was but contingent.

(m) *Supra*, Vol. I. p. 193. 240. *R. v. Hebden*, 2 Str. 1109. Sel. N. P. 1069; where, on a *quo warranto* to try the defendant's right to be a bailiff of Scarborough, in setting out his right he showed his own election under Batty and Armstrong, two former bailiffs, alleging, that at the time of his election they were bailiffs. One of the issues was taken on the allegation that they were bailiffs. The onus of proof lying on the defendant, he gave general evidence to prove their title; and on the other hand, the prosecutor gave evidence of the custom of the borough of electing bailiffs, and produced a record, whereby judgment of ouster was given against Batty and Armstrong; this evidence was admitted, notwithstanding the objection taken that this was *res inter alios acta*; and upon a motion for a new trial, after a verdict for the crown, the Court held that the evidence had been properly admitted; for the defendant (it was said) makes title under, and takes upon himself to justify, their election, and therefore ought to be bound by what has been transacted by them.

(n) *Ib.* and *R. v. Grimes*, 5 Burr. 2598. *R. v. Mayor of York*, 5 T. R. 72.

(o) B. N. P. 210. *R. v. Babb*, 3 T. R. 579.

(p) *Ibid.*

(q) *Brocas v. Mayor, &c. of London*, 1 Str. 307.

(a) For the conflicting decisions on the subject see East's P. C. 434. [*The State v. Le Blanc*, 1 Const. Rep. 354. *Pennsylvania v. Sullivan*, Addison's Rep. 143.]

PART
IV.Presumptive
evidence.Age of wit-
ness.Confirmatory
evidence.

Where the prosecutrix swore that the prisoner had had his will of her, and remained on her body as long as he pleased, but could not speak to emission, Buller, J. held, that it was sufficient evidence of an actual rape to be left to the Jury (*b*). And in the case of *Fleming and Wyndham*, where the deposition of the prosecutrix, who was dead at the time of the trial, was read in evidence against them, containing a general allegation of the charge; this being corroborated by other evidence of the actual force and penetration, was held to be sufficient to warrant a conviction, although there was no direct evidence of emission (*c*).

It was formerly held, that a child under the age of seven years (*d*) could not be examined as a witness; but this rude and inartificial rule of measuring capacity by years was overruled in the case of *Brazier* (*e*), where it was unanimously held by all the Judges, that a child of *any* age, if she were capable of distinguishing * between good and evil, might be examined on oath (*f*). Lord Hale has observed, with respect to the proof of this offence (and his observations have been very frequently repeated to Juries in after times) (*g*): "It is true, rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, be he never so innocent." Again, he observes (*h*), "The party ravished may give evidence upon oath, and is in law a competent witness (*i*); but the credibility of her testimony, and how far she is to be believed, must be left to the Jury, and is more or less credible according to the circumstances of

(*b*) *Harmwood's case*, Winch. Sp. Ass. 1787; East's P. C. 440; and in consequence, he directed the defendant to be acquitted on the indictment, which merely charged him with the attempt. He said, that he recollected a case where the prosecutrix swore that she did not perceive any thing to come from the man, but that she had had many children, and was never in her life sensible of emission from man. And that was ruled not to invalidate the evidence which she gave of a rape having been committed upon her.

(*c*) 2 Leach's C. C. L. 996; East's P. C. 440.

(*d*) Stra. 700; Hale's P. C. 634, 5.

(*e*) 1 Leach, 237; East's P. C. 443; and see *Powell's case*, *ibid.* [*The State v. Le Blanc*, 1 Const. Rep. 354. *acc.*]

(*f*) *Supra*, tit. *Infant*. *R. v. Powell*, Leach's C. C. L. 128. *R. v. Brazier*, Leach's C. C. L. 237; East's P. C. 443.

(*g*) 1 Hale, 635.

(*h*) *Ibid.* 633.

(*i*) *Supra*, 770.

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the fact that concur in that testimony. For instance, if the witness be of good fame; if she presently discovered the offence, and made pursuit after the offender; showed circumstances and signs of the injury (*k*), whereof many are of that nature that only women are the most proper inspectors. If the place wherein the fact was done were remote from people, inhabitants, or passengers; if the offender fled for it, these and the like are concurring evidences to give greater probability to her testimony when proved by others as well as herself.

"But on the other side, if she concealed the injury for any considerable time after she had an opportunity to complain; if the place where the fact was supposed * to be committed were near to inhabitants, or common recourse, or passage of passengers, and she made no outcry when the fact was supposed to be done, when and where it is probable she might be heard by others; these, and the like circumstances carry a strong presumption that her testimony is false and feigned."

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The fact that the prosecutrix made complaint recently after the commission of the alleged crime seems to be considered as admissible generally (*m*). It is a test applicable to the accuracy as well as the veracity of the witness, and therefore, it seems, that her account of the transaction, if communicated recently, is admissible (*n*).

In principle, such evidence is not in general admissible until the testimony of the witness has been in some degree impeached, by some attempt to show that the statement is a fabrication. But in a case of this nature, after *prima facie* evidence has been given of the perpetration of the crime, the defence usually rests upon some impeachment of either the honesty or the accuracy of the witness, and in either case the evidence seems to be admissible on the strictest principles.

If the prosecutrix be an infant of tender years, the *whole* of her account recently given seems to be admissible, for it is of the highest importance to ascertain the *accuracy* of

(*k*) Fresh discovery and pursuit, in the case of an appeal, were not only evidence to support it, but essential to it. Thus, Bract. lib. III. cap. 28. f. 147. a. "Cum igitur virgo corrupta fuerit, et oppressa statim cum factum recens fuerit cum clamore et hutesio debet accurere ad villas vicinas, et ibi injuriam sibi illatam probis hominibus ostendere sanguinem, et vestes suas sanguine tinctas et vestium scissuras."

(*m*) 1 Hale, 633. *Brazier's case*, East's P. C. 445; *Leach's C. C. L.* 237.

(*n*) *Brazier's case*, East's P. C. 445.

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her recollection (o). The state and appearance* of the prosecutrix, marks of violence upon her person, and the torn and disordered state of her dress recently after the transaction, at the time of complaint, are material circumstances, which are always admissible in evidence (p).

Several (women as well as men) may be convicted as principals in the second degree, in an offence of this nature (q) (1).

Competency,
wife.

The wife is a competent witness against her husband, where he has assisted another to commit the offence (r).

Defence.

It is no defence that the prosecutrix consented, through fear (s), or that she was a common prostitute (t), or that she assented after the fact (u); or that she was taken at first with her own consent, if she was afterwards forced against her will (w). The notion that her conception is evidence of consent has long been exploded.

Character.

The character of the prosecutrix for chastity may be impeached by general evidence (x) (2); even although the defendant has not attempted to impeach the prosecutrix's character for chastity on cross-examination (y). But evi-

(o) See *Brazier's case*, East's P. C. 445. In the case of *R. v. Clarke*, 2 Starkie's C. 241, upon an indictment for an attempt to commit a rape upon an adult, Holroyd, J. held, that the *particulars* of the complaint made by the prosecutrix recently after the injury were not admissible in evidence. *Qu.*

(p) See *R. v. Clarke*, 2 Starkie's C. 241.

(q) 1 Hale, 628, 9; 1 Haw. c. 41. s. 6; 4 Bl. Comm. 212; East's P. C. 446.

(r) Lord *Castlehaven's case*, 1 Hale, 629; 12 Mod. 349. Lord *Audley's case*, Hutt. 116; 1 St. Tr. 387; 1 Str. 633.

(s) Dalt. 105. 607; Haw. c. 411.

(t) 1 Haw. c. 41; Bract. 147, 8.

(u) *Ibid.*

(w) East's P. C. 444; Cro. Car. 485.

(x) *Hodgson's case*, by a majority of the Judges on a case reserved, and Cor. Wood, B. York Summ. Ass. 1812, *supra*, 368. *R. v. Clarke*, 2 Starkie's C. 241.

(y) *R. v. Clarke*, 2 Starkie's C. 241. *Supra*, note (o).

(1) [In *Commonwealth v. Cooper*, 15 Mass. Rep. 187, the court instructed the jury that if they could not agree to convict the defendant of a rape (the offence for which he was indicted) they might find him guilty of an assault with an intent to commit a rape. In *Commonwealth v. Green*, 2 Pick. 380, it was held that an infant, under the age of fourteen years, who is by law presumed to be unable to commit a rape, was well convicted of an assault with an intent to commit that offence. Parker, C. J. *dissenting*.]

(2) [See Vol. II. 369, note (1).]

dence of particular facts for this * purpose is inadmissible (y). The prisoner may, however, show that the prosecutrix has been previously criminally connected with himself (z).

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Defence.
Character.

Where the general character of the prosecutrix for honesty has been impeached by cross-examination, as to particular facts, evidence of subsequent good conduct is admissible on the part of the prosecution (a).

Upon a trial for an unnatural crime, an admission by the prisoner that he had committed such an offence at another time, and with another person, and of his inclination for such practices, is not admissible in evidence against him (b).

RATE.

THE appellant must, in the first place, prove his notice of appeal in writing, signed by the appellant or his attorney, on his behalf, to have been delivered to or left at the places of abode of the churchwardens, or any two of them, which must specify the particular causes or grounds of appeal; and no other cause or ground of appeal than such as are stated, can (without consent of the overseers, and of any other person interested therein) be examined or inquired into by the * Court (c); several appellants may give joint notices (d), and one appeal against several rates is sufficient (e). Notice.

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Notice of appeal must also be given to the persons alleged to be rated or omitted, or over-rated or under-rated (f). But where one of the grounds was, that the ap-

(y) *R. v. Hodgson, supra*, note (w).

(z) *Ibid.*

(a) *R. v. Clarke*, 2 Starkie's C. 241. The prosecutrix, on an indictment for an assault with intent, &c. admitted that she had several years ago been sent to the house of correction on a charge of stealing money from her master. She stated, that she had since been in the refuge for the destitute, and had remained there two years, and had, on going away, received a reward for good behaviour; and the superintendent of the establishment was admitted on the part of the Crown to prove the good conduct of the prosecutrix whilst in that asylum, and the practice of giving rewards.

(b) *R. v. Gole*, Phillips on Ev. 143. 3d ed. 1 Burn's J. 393, 23d edit.

(c) By the stat. 41 Geo. 3. c. 23. sect. 4 and 5.

(d) *R. v. Justices of Sussex*, 15 East, 206; *R. v. White*, 4 T. R. 771.

(e) *R. v. Justices of Suffolk*, 1 B. & A. 640.

(f) 41 Geo. 3. c. 23, sect. 6.

PART not under seal cannot operate as an estoppel, but is mere
IV. evidence of the fact to be submitted to a * Jury, and capa-

* 1275 tempting to defraud others, and to recognize the transfer of choses in action without confounding all legal distinctions. Notwithstanding these reasons, derived from so great an authority, the question not having met with any solemn decision in Bank may yet be open to consideration. A receipt not under seal does not operate as an estoppel, but is like a parol declaration, mere evidence of the fact of payment; and it is for the Jury to estimate its effect. If then a receipt, or parol declaration be offered as mere evidence of a fact, are not the circumstances under which it was given equally evidence as part of the transaction, as explanatory of its real nature, and as showing what reliance ought to be placed upon it? Although the evidence of fraud be not admissible merely for the purpose of establishing the right of a third party to a chose in action, yet why is it not admissible to show a legal title subsisting in the plaintiff? for that is the tendency of the evidence; in which respect, such a receipt differs essentially from a release of the debt under seal, which would operate as an estoppel, or a security under seal, which might operate as an extinguishment; whereas a mere receipt operates as evidence only. *Non constat* but that the plaintiff himself, although a wrong-doer in being a party to such collusion, may be willing to retrace his steps, and recover for the benefit of his creditors, for whom he is a trustee; and it is difficult to say why he should be estopped from so doing by any act which would not amount to a legal estoppel. In so doing he does not seek to take advantage of his own wrong, but having done wrong endeavours to repair his fault. Where indeed a release has been given in such a case by the debtor, the Courts have, upon application in Bank, set it aside; (See *Legh v. Legh*, 1 B. & P. 447, and *supra*, 40, note (1)), but it would be almost impossible to say *a priori* with what evidence the defendant may come prepared at the trial, which may have been fabricated collusively between himself and the nominal plaintiff; and therefore it would be difficult to make any application to the Court in Bank, which would effectually restrain him, short of enjoining him from setting up any subsequent discharge of the debt by way of defence, which might in effect be to prejudice the whole case. As the Court does undoubtedly possess what has been termed an equitable jurisdiction in such cases (so termed, not because it does not properly belong to a court of law, as distinguished from a court of equity, but because it is founded, as all rules of law are, or ought to be, on just and equitable principles) there seems to be no reason why that jurisdiction should not be exercised, according to the exigency of circumstances, in Bank, when the application can properly be made there, or upon the trial, where a fraud is sought to be effected under the colour and pretext of mere evidence of the fact, provided it can be done without violating any rule of law. It is by no means true that the Court will not regard mere equitable relations with a view to the real fact, and for the purposes of justice. This is very frequently done in the action for money had and received. But in the principal case there seems to be no necessity for regarding mere equitable relations in order to let in the evidence of fraud; but the simple question is, whether the plaintiff is not to be permitted to answer and explain that which is mere evidence, by showing that the transaction taken altogether has no tendency to prove the fact, but

ble of being rebutted by the other circumstances of the case (c). In the late case of *Lampon v. Corke* (d), in an action for goods sold and delivered, and on the money-counts, the defendant gave in evidence a deed executed by the plaintiff, which recited that the plaintiff had given possession of certain premises and growing crops, taken in execution by the plaintiff as a judgment-creditor against a third person, and that the defendant had agreed to pay the plaintiff the sum of 40*l.* for such possession; and also stated, that in pursuance of such agreement, and in consideration of the sum of 40*l.* being now so paid to the plaintiff as hereinbefore is mentioned, and also in consideration of the sum of 10*s.* a-piece paid to the plaintiff and the judgment-debtor, the plaintiff did generally release the defendant; (there was also indorsed on the deed a receipt by the plaintiff for the sum of 40*l.*) it was clearly proved, and admitted, that the sum of 40*l.* had not been actually paid. And it was held, that upon the construction of the deed itself it did not operate as a release; and that as the *re-

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is bottomed in fraud. The receipt not amounting to a release or extinguishment of the debt, it still subsists in law, and if it subsist in law may be recovered at law, and for that purpose it should seem that all evidence is admissible which tends to show that the debt still subsists. It would be a solecism to say that the debt under the circumstances still subsists, but that the plaintiff cannot be permitted to show that it still subsists by evidence. If indeed the plaintiff could not recover but through the medium of a fraud, the maxim would apply in *pari delicto potior est conditio defendentis*; but the plaintiff seeks but to recover a debt *bona fide* due to him, and the defendant endeavours to protect himself by means of his own fraud. This case seems to be directly opposed in principle to that of *Cockshott v. Bennett*, 2 T. R. 763, (and see *Smith v. Bromley*, Doug. 696,) where a promissory note given by the defendant to the plaintiff, in discharge of part of a debt justly due, was held to be void, because the collateral effect was to defraud other creditors of the defendants, who had been induced to enter along with the plaintiff into a composition-deed; and the plaintiff, in fraud of the other creditors, had refused to execute the deed unless the remainder of his debt was secured by giving the promissory note in question. If a promissory note given as a security for a debt really due can be impeached by evidence of fraud, in respect of third persons, it is difficult to say upon what principle such evidence is not equally admissible in order to impeach a fraudulent receipt. The Courts, in the cases adverted to, proceed upon the broad principle that a security is void if given in fraud of third persons, and shall not be available even as between the parties themselves. The same principle seems to apply in the fullest extent in the case of *Alner v. George*. See *Bristow v. Eastman*, 1 Esp. C. 172.

(c) See the observations of Holroyd, J. in *Lampon v. Corke*, 5 B. & A. 611.

(d) 5 B. & A. 606.

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ceipt upon the deed was not under seal, it would not operate as an estoppel, but only as evidence, and then, as it was admitted that no money had, in fact, been paid, it became of no importance.

A receipt in full, given with a full knowledge of all the circumstances, and in the absence of fraud (c), seems to be conclusive (d).

If a man by his receipt acknowledges that he has received money from an agent on account of his principal, and thereby accredits the agent with the principal to that amount, such receipt is, it seems, conclusive as to payment by the agent (e) (1). Thus the usual acknowledgment in a policy of insurance of the receipt of premium from the assured is conclusive of the fact as between the underwriters and the assured (f), although not as between the underwriter and the broker. A receipt on the back of a bill of exchange is *prima facie* evidence of payment by the acceptor (g). The giving a receipt does not exclude *parol* evidence of payment (h).

RECORD.

Proof of.

- * 1277 THE mode of proving a record by mere production, or by copy, has already been considered (a); where the * record is pleaded it must be tried on the issue of *nul tiel record*, and then it should be proved by the production of the record itself, or of its tenor *sub pede sigilli* (b). But

(c) *Benson v. Bennett*, 1 Camp. 394, n.

(d) *Bristow v. Eastman*, 1 Esp. C. 172.

(e) See *Dalzell v. Mair*, 1 Camp. 532. In an action by the assured against the underwriter for a return of premium, the policy having been effected by a broker, and confessing payment of the premium in the usual form, it appeared that no money had, in fact, been paid, but that the plaintiff, being the holder of a dishonoured bill, accepted by the broker, proposed, in satisfaction of the bill, that the broker should get policies underwritten for him, and the broker having a running account with the underwriter the policy was effected in consequence, Lord Ellenborough, C. J. held that the defendant was bound by the receipt in the policy.

(f) *Ibid*.

(g) *Peake's C.* 125.

(h) *Rambert v. Cohen*, 4 Esp. C. 214.

(a) *Supra*, Vol. I. 151.

(b) *Sty.* 22; 1 *Sid.* 142; *Bac. Ab. Ev. F.*; *supra*, Vol. I. p. 150.

(1) [See *Peck & al. v. Harriott & al.* 6 *Serg. & Rawle*, 146. *Sherman v. Crosby*, 11 *Johns.* 70.]

when issue is joined on the fact, the record may be given in evidence in support of the fact, or it may be proved by means of a sworn copy (c). In such case the whole should be proved, or at least so much as is material to the question (d). A document purporting to be a record of the conviction of a prisoner of felony, without any caption, is inadmissible, being imperfect as a record, inasmuch as the indictment does not appear to have been found by persons of competent jurisdiction (e). It has been seen that the record of a verdict is not evidence to prove the facts which it finds, unless the judgment be also proved, or the decree founded upon it where the trial was on an issue out of Chancery (f). By the stat. 3 & 4 Ed. 6. c. 4, and 13 Eliz. c. 6, patentees, and all claiming under them, may make title by showing the exemplification or *constat* of the roll; and these statutes extend to all the king's patents which concern land privilege, or any thing else granted to a subject or corporation (g). The nature of the proof where a record has been lost has already been considered (h).

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Proof of.

The effect of a record of a verdict and judgment, either as mere evidence of a fact, or to establish the legal consequences of the judgment (i), or as operating between private parties (k), either by way of estoppel (l) * or as evidence of a disputed fact (m), or in criminal cases (n), or where the judgment operates *in rem* (o), have already been considered. * 1278

The mode of impeaching a judgment, decree, or sentence, has also been considered (p). It is further to be observed, that no collateral proof is admissible to impeach the authenticity and accuracy of a record. Thus evidence is inadmissible to show that the finding of the Jury was mistakenly indorsed on the *postea* (q); but an officer may be examined as to the state and condition, although not as to the matter of a record (r). A judgment, though erroneous, is binding, until it be reversed. Thus an execution

How im-
peached.

(c) Sty. 22; 1 Sid. 142; Bac. Ab. Ev. F.; *supra*, Vol. I. p. 150.

(d) Trials per Pais, 166; 3 Inst. 173; 1 Mod. 117; Bac. Ab. Ev. F. 10 Co. 92. b. Com. Dig. Ev. A. 4.

(e) *Cooke v. Maxwell*, 2 Starkie's C. 183.

(f) Vol. I. 245. 6.

(g) 5 Co. 53. Co. Litt. 225. b.

(h) *Supra*, Vol. I. 159.

(i) Vol. I. p. 183. 187.

(k) *Ibid.* p. 191. 205.

(l) *Ibid.* p. 205.

(m) Vol. I. p. 206.

(n) *Ibid.* p. 217.

(o) *Ibid.* p. 227.

(p) Vol. I. p. 252.

(q) *Reed v. Jackson*, 1 East, 355.

(r) *Leighton v. Leighton*, 1 Str. 210.

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on an erroneous judgment is valid, until reversal (*s*). An accessory cannot take advantage of error in the judgment against the principal (*t*). And an erroneous judgment against the husband for treason, is, whilst unreversed, sufficient to deprive the wife of her dower (*u*). Where, in an action of trespass for an injury to the person, the record of an acquittal of the defendant is produced, for the purpose of showing that the civil action has merged in the felony, evidence is admissible to show that the acquittal was obtained by collusion (*v*).

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It has been seen, that in an action for diverting water from the plaintiff's mill, a previous verdict for the defendant, in an action by the same plaintiff, for the disturbance of the same right, was held to be admissible, * but not conclusive evidence (*w*). In principle it is exceedingly difficult to conceive *in what degree* such evidence tends to rebut evidence adduced to prove the right, or how it ought to be estimated by a Jury where the second action relates to a later period of time than the former; the verdict for the defendant shows indeed, strongly, if not conclusively, that the plaintiff was not entitled to *damages* in the former action. But the plea in the former action being general, it does not at all appear, neither, as it seems, can it be shown by evidence, upon what ground the former verdict proceeded. It is consistent with the former verdict that the plaintiff fully established his right, but that he failed in proving a disturbance by the defendant, or that the latter proved satisfaction, or a release, which was held to be a bar to the action; how then can the verdict be evidence to disprove the right when it is perfectly consistent with the existence of the right? (*x*). And even assuming that the former verdict was founded on the evidence as to the right, it is exceedingly difficult to say what degree of weight in the scale of evidence is to be attributed by the

(*s*) 1 Ld. Raym. 546. *Holmes v. Walsh*, 7 T. R. 465.

(*t*) 1 Hale, 625. *R. v. Baldwin*, 3 Camp. 265.

(*u*) Per Lawrence, J. *Holmes v. Walsh*, 7 T. R. 465.

(*v*) *Crosby v. Leng*, 12 East, 412.

(*w*) *Vooght v. Winch*, 2 B. & A. 662, *supra*, Vol. I. p. 207, and see *Outram v. Morewood*, 3 East, 346, and *Strutt v. Bovingdon and others*, 5 Esp. C. 56.

(*x*) For similar reasons, an acquittal upon an indictment for the non-repair of a highway, under the plea of not guilty, is not, as it seems, evidence to repeal the obligation to repair upon the trial of a second indictment, *R. v. St. Pancras*, Peake's C. 219. *supra*, Vol. I. 200. But a former conviction is conclusive as to the liability, unless fraud be shown. *ib*.

Jury to the opinion of a former Jury, without the means of knowing the reasons which led them to that decision, or how far they are to distrust their own opinion, formed upon grounds which they do know, in order to embrace the opinion of strangers, formed upon grounds which they do not know, and of which, by the rules of evidence, they cannot be informed. A previous * verdict for the plaintiff is not

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liable to the former of these objections, inasmuch as it necessarily involves the proof of the plaintiff's right (y); still such a verdict offered as evidence under the plea of the general issue would not be conclusive (z).
In the case of *Bredon v. Harman* (a), it was held that in a *qui tam* action, evidence of a recovery of the * same

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penalty, by another plaintiff, was not admissible to defeat the action on the issue of *nil debet*; for and he pleaded it the plaintiff might have replied that it was a recovery by fraud to defeat the prosecutor, which he would not be prepared to prove under that issue; in this case it is to be
(y) According to the report of the case of *Vooght v. Winch*, the Court announced an opinion that the defendant might have availed himself of the former verdict, by pleading it as an estoppel; but as that was not the question in the case, but at most an *obiter dictum*, it may not be improper respectfully to suggest a doubt whether the former verdict could have operated as an estoppel to the second action, by which damages were claimed down to a later period than in the former action; for the most that the former verdict and judgment proved was, that the plaintiff was not entitled to damages in respect of any supposed injury committed previously to the former action; it could not, as it seems, be conclusive as to any subsequent claim, unless it were conclusive as to the plaintiff's right to the water, and it could not be conclusive as to the right, inasmuch as no issue was joined upon the right, and the verdict might have turned upon a matter collateral to the right. In the case of *Sir Frederick Evelyn v. Haynes*, cited in *Outram v. Morewood*, 3 East, 355, upon a second action for obstructing a watercourse, and not guilty pleaded, *Ld. Mansfield* held that a former verdict for the plaintiff, when given in evidence, was not considered by the law as conclusive as to his right; and *Ld. Ellenborough* adds, it could only be conclusive upon the right, if it could have been used, and were actually used, in pleading by way of estoppel, which it could not be in that case, first, because no issue was taken in the first action, upon any precise point, which is necessary to constitute an estoppel thereupon in the second action; and secondly, it was not even pleaded by way of estoppel in the second action, but only offered as evidence under the general issue.

(z) *Sir F. Evelyn v. Haynes*, cited 3 East, *supra*, note (y).

(a) 1 Str. 701, and in the case of *Vooght v. Winch*, 2 B. & A. 662, *supra*, Vol. 1. 206; the case of *Bird v. Randall*, 3 Burr. 1345, where it was held, that a recovery by the plaintiff against a covenant servant for leaving his service was a bar, under the general issue, in an action against a defendant for seducing that servant from the plaintiff's service, was denied.

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observed, that recovery was by a third person to which the plaintiff in the second action was not privy, and therefore that he ought to be apprized of the intended defence by means of a special plea.

Where, however, the plaintiff has already recovered damages in trespass or trover for a conversion of his goods, the record will, it seems, be a bar to an action of trover, for converting the same goods under the general issue, for the effect of the former recovery is to vest the property in the defendant (b). And in an action of assumpsit or debt, it seems that a former verdict or judgment for the same cause of action is not only admissible, but frequently conclusive evidence, although it be not pleaded. In *Burrows v. Jemino* (c), King, Lord Chancellor, said, that upon a trial at law on a bill of exchange accepted by the defendant, he would permit the defendant to prove at the trial that the acceptance had been vacated by the sentence of a court of competent jurisdiction in the country where it was made; and his lordship cited a case which came before * 1282 him in the Mayor's Court, when he was Recorder of London, where a mariner having sued for wages, and there being a sentence against the plaintiff in the Admiralty Court, in an action for the same wages, he doubted whether he could allow the defendant to give the sentence of the Admiralty Court in evidence upon *non-assumpsit*; and that he asked the opinion of Holt, C. J. who said, that whatever defeated the promise might be given in evidence on *non-assumpsit*. In the case of *Kitchen and others v. Campbell* (d), in an action for money had and received by the defendant, upon the sale of certain goods, to the use of the plaintiffs, as the assignees of a bankrupt, it was held, that a verdict for the defendant, in an action of trover brought by the same plaintiffs, as such assignees, to recover in respect of the same goods, was a bar to the action. In the case of *Cameron v. Reynolds* (e), which was

(b) *Adams v. Broughton*, 2 Str. 1078; Andr. 18. In *Smith v. Gibson*, Rep. T. H. 319, Ld. Hardwicke observed, "there are several cases where a recovery in one action shall be a bar to another action of the same nature, but that is where the recovery is a satisfaction for the very thing demanded by the second action. In an action of trover the plaintiff recovers damages for the thing, and it is as a sale of the thing to the defendant which vests the property in him, and therefore it is a bar to an action of trespass for the same thing." See also *Mertens v. Adcock*, 4 Esp. C. 251; *infra*, *Vendor & Purchaser*. [Yelv. 68. note (1).]

(c) 2 Str. 733.

(d) 3 Wils. 304. S. C. 2 Bl. Rep. 827.

(e) Cowp. 403.

an action on the case against an under-sheriff for not executing a bill of sale to a trustee for the plaintiffs, of certain goods seized by him under a *fieri facias* at the suit of the plaintiffs, it was held that a rule of Court giving specific relief to the plaintiffs, by ordering a former bill of sale to be cancelled, and the present bill of sale to be executed, was a bar to the action under the plea of not guilty, on the broad ground that a man should not be permitted to pursue a second recompense (f).

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evidence.

So it has been held that under the plea of *non-assumpsit*, a garnishee against whom a recovery and execution have been had in the Mayor's Court, in foreign attachment, after the issuing of a summons to the * defendant below, and *nihil* and *non-inventus* returned, may * 1283 protect himself by giving the proceedings in evidence on an action to recover the same debt (g), and that it was not necessary for him to prove the debt of the plaintiff below, who attached the money in his hands. Even an award made by an arbitrator, to whom the parties have referred the question in dispute, is final under the plea of the general issue to an action of *assumpsit* (h).

As an award made by the referee of the parties is conclusive evidence under the general issue, the record of a verdict and judgment must in principle be equally operative; and, in general, from the establishment of the rule, that a release, accord and satisfaction, or the merger of a simple contract debt in a higher security, is evidence in bar under the general issue in an action on the simple contract (i); it seems also to follow in principle, that a judgment for the recovery of the same debt, especially if execution has followed, or a judgment for the defendant, for the same cause of action, are equally admissible; such evidence would no more take a plaintiff by surprise, than evidence of a release would, for he is equally privy to both, and a judgment of a court of competent jurisdiction shows that the debt does not exist.

(f) Note, that part of the rule was, that all further proceedings should be stayed. It was also held that an action ought to have been brought against the high sheriff.

(g) *Macdaniel and another v. Hughes*, 3 East, 367. And see 1 Will. Saund. 67, a. and the cases there cited.

(h) *Price v. Hollis*, 1 M. & S. 105.

(i) Com. Dig. tit. *Pleader*, 2 G. 12. Cro. Eliz. 201. 5 Mod. 314. Cro. Jac. 33. Cro. Car. 415. B. N. P. 182.

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RECOVERY.

Recovery.

In general, where the party suffering a recovery had power to suffer it, it is to be presumed that all * things were regularly done till the contrary appear (a). In such case it is sufficient to produce and prove an examined copy of the recovery (b). But where the party suffering the recovery had no title in himself, being but a remainder-man, or reversioner; or if there be evidence to show that there was at the time of the recovery an estate for life in another, then a surrender by the tenant for life, in order to make a tenant to the præcipe, ought to be proved (c), either directly, by proof of actual seisin, or of the deeds by which he is made a freehold tenant, or by presumptive evidence.

Presumptive
evidence of
surrender of
life estate.

Where the freeholder is a trustee for the tenant in tail himself, acting under his power and direction, such a presumption (d) arises.

So the presumption may be founded on the acquiescence of those who were interested in disputing the validity of the recovery, and who have had opportunity to dispute it (e).

Where a recovery has been suffered by a tenant in tail, during the existence of the estate for life, and possession has long gone according to the recovery, a surrender of the life-estate is to be presumed (f). This presumption cannot

* 1285 however be made where the * title is disputed recently after the death of the person who was entitled to hold, without the aid of the recovery (g). If there be tenant for life, with remainder in fee, and he in remainder suffer a reco-

(a) 2 Burr. 1065. But if the deeds be produced, and it appear that there was in fact no good tenant to the præcipe, the presumption is destroyed. *Earl of Suffolk's case*, 1747, cited 2 Burr. 1073. See the case of *Lincoln College*, 3 Co. 58. *Keen v. The Earl of Effingham*, 2 Str. 1267, where the question was (20 Geo. 2.) as to the validity of two recoveries suffered in 1714 and 1721, when the Court held, that, although after such a lapse of time proper tenants to the præcipe would be presumed where no deed appeared, yet these being insufficient, they could not presume that there were others which were good. *Sed quare*.

(b) Cro. Jac. 455; Lutw. 1549; 1 Mod. 117.

(c) 5 Mod. 211.

(d) Per Lord Mansfield, 2 Burr. 1073.

(e) Ibid.

(f) *Goodtitle d. Bridges v. Duke of Chandos*, 2 Burr. 1065. Bac. Abr. Ev. F.

(g) Ibid.

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very, with a single voucher, if the recovery have been ancient, and there has been constant enjoyment under the recovery, the Court will presume a surrender by the tenant, so as to make a lawful tenant to the præcipe (*h*).

But the length of time on which such a presumption is founded is to be reckoned not from the date of the recovery, but from the period when possession began to go according to the recovery (*i*). If, therefore, after the recovery suffered by a tenant in tail, the tenant for life remain in possession for more than thirty years afterwards, the length of time does not begin to run until the death of the tenant for life (*k*).

And it seems, therefore, that no presumption can be made from mere length of time after the recovery suffered, unless there be some circumstance of enjoyment, and acquiescence under the recovery, or other evidence to show that a recovery has in fact been suffered; for otherwise there is no ground to build a presumption upon. For instance, if an eldest son, who has a remainder in tail, should privately suffer a recovery, and his father should live many years afterward, there would be no pretence for presuming a surrender of the father's life-estate (*l*). But although a possession by a tenant in tail, after the death of the tenant for life, may be ascribed to the tenancy in tail, *as, well as * 1286 to a recovery previously suffered, yet, after a long possession by the tenant in tail, the presumption ought, it seems, to be made; for it is probable, from the *acquiescence* of the tenant in tail under his former recovery, that he knew that it was not defective (*m*).

In the case of *Warren d. Webb v. Grenville* (*n*), where a recovery had been suffered by a son who was tenant in tail forty years before, the estate for life being then in the widow, the Court expressly held that a surrender was to be presumed from mere lapse of time, without taking into consideration the circumstantial evidence, tending strongly to prove that a surrender had in fact been made, *viz.* the proof of the debt-book of a deceased attorney, in which he charged 32*l.* for suffering the recovery, two articles of

(*h*) *Anon.* 1 Vent. 257. S. C. reported differently by the name of *Green v. Froud*, 3 Keb. 310, 311; and by the name of *Green v. Froud*, 1 Mod. 117.

(*i*) 2 Burr. 1065.

(*k*) *Goodtill d. Bridges v. Duke of Chandos*, 2 Burr. 1065.

(*l*) Per Ld. Mansfield, 2 Burr. 1076.

(*m*) *Ibid.*

(*n*) 2 Stra. 1129.

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life estate.

which were for drawing and ingrossing a surrender by the mother, and in which the bill was acknowledged to have been paid. From this declaration of the Judges, therefore, it should seem as if mere lapse of time, even during the life of the tenant for life, would warrant the presumption. This, however, is qualified and limited by *Ld. Mansfield's* account of the case, in *Goodtitle d. Bridges v. The Duke of Chandos* (o); from which it appears, that the report of *Warren v. Grenville*, in *Strange*, is defective, in not stating the important fact, that the jointress (the tenant for life) had been *dead a vast number of years*; a circumstance which reconciles the declaration of the Court in *Warren v. Grenville*, as applied to that case, with the doctrine expounded in *Goodtitle d. Bridges v. The Duke of Chandos* (p).

* 1287

Statute 14
Geo. II. c. 20,
s. 1 & 2.

* By the stat. 14 Geo. 2. c. 20, it is enacted, that all common recoveries suffered, or to be suffered, without any surrender of the leases for life, shall be valid, provided that it shall not extend to make any recovery valid, unless the person entitled to the first estate for life, or other greater estate, (in case there be no such estate for life in being,) next after the expiration of such lease, have or shall convey, or join in conveying, an estate for life, at least, to the tenant to the præcipe.

By sect. 4, in favour of purchasers, where, by neglect, recoveries have not been entered of record, it is enacted, "That where a person shall have purchased any estate for a valuable consideration, whereof a recovery was necessary to complete the title, he, and those claiming under him, having been in possession, may, at the end of twenty years from the time of such purchase, produce in evidence the deed, &c. making a tenant to the writ of entry, &c. for suffering a common recovery, and declaring the uses, &c.; and such deeds (the execution being *duly* proved) shall be deemed good evidence for the purchaser, &c. that such recovery was duly suffered, and perfected according to the purport of such deed, &c. in case no record can be found, or the same should be found not to be regularly entered;

(o) 2 Burr. 1065.

(p) In the case of *dame Griffin v. Stanhope*, (Cro. J. 455,) the Court intended the recovery to be good; but it appears, that possession had gone along with the recovery. In 2 Lutw. 1549, at the end of the case of *Leigh v. Leigh*, it is laid down, that in every common recovery it shall be intended that there was a good tenant to the præcipe till the contrary appear; this, however, it seems, was but the reporter's own speculation, and not an adjudication of the Court.

provided the person making such deeds, &c, had a sufficient estate and power to make a tenant to such writ."

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And by the 5th sect. of the same act, it is enacted, "That after twenty years from the time of suffering, all common recoveries shall be deemed good and valid to all intents and purposes, if it appear upon the face of such recovery that there was a tenant to the writ; and if the person joining in such recovery *had a sufficient estate, and power to suffer the same, notwithstanding the deed or deeds for making the tenant to such writ should be lost, or not appear."

Statute 14
Geo. II. c. 20.

* 1288

This act applies to those cases only where the party who suffered the recovery had a sufficient estate to enable him to do so, and does not alter the rules of evidence as to recoveries suffered by tenants in tail, during the existence of the estates for life. Where, therefore, the party suffering the recovery had no power to suffer it, but only an estate-tail, or remainder expectant on the death of the tenant for life, it is essential to prove, either directly, by proof of the necessary deeds, or by presumptive evidence, that there was a good tenant to the præcipe (*p*).

It has been seen that a fine is proved by the production of the chirograph (*q*). It will be presumed that a fine has been levied with proclamations till the contrary be shown (*r*). But to prove that a fine has been levied with proclamations, it is necessary to produce and prove a copy, examined with the roll: the chirograph is insufficient for the purpose; for the chirographer is not authorized to make out copies of the proclamations (*s*).

In order to render a fine available, a seisin of the estate by the party who levied it is essential; but proof of possession, or of the receipt of rent, is *prima facie* evidence of seisin (*t*).

* RECTOR, &c.

* 1289

THE plaintiff, in an action against a preceding incumbent for dilapidations, must, under the general issue, prove his own title to the church, as in an action of ejectment (*a*). Dilapidations.

(*p*) 5 Mod. 211.

(*q*) *Supra*, 566.

(*r*) *Supra*, 1242, (*g*).

(*s*) B. N. P. 129; *supra*, Vol. I. p. 154.

(*t*) *Doe v. Williams*, Cowp. 622. *Supra*, 567.

(*a*) See tit. *Ejectment*.—*Presumption*.—*Quare Impedit*.—*Tithes*.

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Also, that the defendant, or the party whom he represents, was possessed of the living. Evidence, by way of admission, as by proof of his having acted as such, by taking tithes, or other profits of the living, will suffice for this purpose. Lastly, he must prove the state of dilapidation in which the premises were left, and the amount required to put them in a proper state of repair.

It seems to be no answer on the part of the defendant, nor even to be evidence in reduction of damages, that the premises were in a dilapidated state when he or his testator took possession (b).

Non-residence. In an action to recover penalties for non-residence (c),
* 1290 * the plaintiff must first prove the obligation to reside, by evidence of the holding of the *benefice* by the defendant. The formal and strict proof of presentation, institution, and induction, is unnecessary; it is sufficient to prove that the defendant has acted as incumbent, as by receiving tithes or other profits of the living in that character (d).

Secondly, he must prove the fact of absence; and for this purpose, if there be a parsonage-house within the parish, residence in another house will subject the defendant to the penalties (e) for non-residence, unless he *has a license from the bishop*, or is entitled to exemption under the stat. 57 G. 3. c. 99. s. 5. 15. (f).

(b) See 3 Burn's Eccles. Law, 184.

(c) By the stat. 57 Geo. 3. every spiritual person holding any benefice, who shall, without such license or exemption as is specified in the act, wilfully absent himself for any period exceeding three months together, or to be accounted at several times in any one year, (and for the purposes of the act, s. 38, the year is to be deemed to commence on the 1st of January, and to end on the 31st of December, both inclusive, and s. 39, a month to be deemed a calendar month, except when a month or months is or are to be made up of different periods, in which case thirty days shall be deemed a month;) and make his residence and abiding at any other place or places, except at some other benefice donative, perpetual curacy, or parochial chapelry, of which he may be possessed, shall, when such absence shall exceed such period as aforesaid, and not exceed six months, forfeit one third of the annual value (deducting all outgoings, except any stipend paid to any curate); and when such absence shall exceed six months, and not exceed eight months, one half of such annual value; and when such absence shall exceed eight months, two thirds of such annual value; and when it shall have been for the whole year, three fourths of such annual value. The whole of such penalties are given to the informer.

(d) *Supra*, 1249, note (r); 1257; and tit. *Tithes*.

(e) *Cannige v. Newman*, 2 Brownl. 54.

(f) By Sec. 6, if there be no house belonging to the benefice, a residence within the limits of the parish is sufficient; and see sec. 9.

Lastly, the annual value of the living. The statute 57 Geo. 3. c. 99. s. 44, provides, that the Court in which the action is pending shall, upon application made for the purpose, require the bishop of the diocese to certify in writing under his hand to the Court, and the party named in the rule, the reputed annual value of the living; and that such certificate shall, in all future proceedings in the action, be received as evidence of the annual value, without prejudice to the admissibility or effect of any other evidence on the subject.

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Value.

A variance in the description of the parish is fatal; as, where the parish was styled *St. Ethelburg*, but the real name was *St. Ethelburga* (g). Variance.

The defendant may prove in defence, under the general issue, that he is within one of the exemptions specified in the statute; but he cannot insist on any other ground of excuse, such as ill health, without the bishop's license, which cannot be granted but on * evidence laid before the bishop, and when granted, will be evidence in bar of the action (h). * 1291

If he rely on an exemption from his appointment as chaplain, he must prove the appointment by the proof of the original document (i); and he must also prove the delivery of a notification of such appointment to the bishop. For this purpose, the original notification from the bishop's registry ought, it seems, to be produced (k).

RELEASE.

A RELEASE (a), if produced, must of course be proved

(g) *Wilson v. Gilbert*, 2 B. & P. 281.

(h) Such a license, if pleaded, will, by the 45th sect. of the stat. entitle the defendant to double costs.

(i) *Supra*, 1258 (h).

(k) See Peake's L. E. 456.

(a) General words in a release are to be taken most strongly against the releasor. *P. C. Thorpe v. Thorpe*, 1 Ld. Raym. 235; 2 Roll. Ab. 409, A. 1. But where there is a particular recital in a deed, and general words follow, the general words shall be qualified by the special ones. *Ibid.* and 2 Saund. 403; 3 Keb. 45. 59; *Lord Arlington v. Merrick*. 1 And. 64; Cro. Jac. 623. *Butcher v. Butcher*, 1 N. R. 113. *Payler v. Homersham*, 4 M. & S. 423. A release given by the indorsee of a promissory note to the payee, will not extinguish the claim of the indorsee against the maker. *Carstairs v. Rolleston*, 5 Taunt. 551. A release in the usual form of all manner and causes of action, &c. extends to all inchoate causes of action then existing, and will, therefore, preclude the releasor, being the acceptor of a bill for the accommodation of the

PART in the ordinary way ; but it may be established by circumstantial evidence (b).
IV.

A release operates as a bar in *assumpsit* under the * general issue (c), and is conclusive, although not pleaded, as
* 1292 it might have been, by way of estoppel (d).

How it may be
impeached.

It seems, however, to be clear, that the plaintiff would be entitled to impeach such release by evidence of any matter which might have been replied in avoidance of the release, had it been pleaded. For the plaintiff cannot, by the defendant's omission to plead the release, be placed in a worse situation than if it had been pleaded (e).

releasee, from suing the releasee for the amount afterwards recovered against the releasor by the holder. *Cartwright & others v. Williams*, 2 Starkie's C. 340. In cases of fraud, the Court will set aside a release given by a nominal plaintiff. *Hickey v. Burt*, 7 Taunt. 48. *Legh v. Legh*, 1 Bos. & Pull. 447 ; or by a co-plaintiff. *Jones v. Herbert*, 7 Taunt. 421.

(b) *Washington & others (Executors) v. Drymer*, Sitt. at Guildh. after Hil. 42 G. 3. Peake's L. E. Appendix. The action was debt on bond, dated 27th Sept. 1766, for 800*l.* conditioned for payment of 400*l.* and interest, on 27th Sept. 1767.

Pleas *non est factum*, *solvit ad diem*, *solvit post diem*, a release, and a discharge under an insolvent act on the 28th May 1778.

To rebut the presumption of payment, the plaintiffs produced an affidavit made by the defendant on the 1st July 1800, before a master in chancery, to whom it had been referred to take an account of the testator's personal estate ; wherein he stated, that the testator, *Michael Foster*, having three daughters, to each of whom he said he intended to give a portion of 1,000*l.* ; the defendant in the year 1764 married one of them, and received a portion of 500*l.*, with an assurance, that he meant to give him 500*l.* more at his death. That he (the defendant) being in want of money in 1766, applied to the testator to assist him, who then lent him 400*l.* on the bond in question, and being about six years afterwards again in distressed circumstances, he again applied to the testator to assist him, who refused, saying, that *he had already had his share of his estate ; that he might do as he pleased with what he had, as he should never call on him for it.* The affidavit then added, that the deponent conceived that the testator had cancelled the bond, and that he had never been applied to for payment by him.—The testator died in 1791.

It was contended, that the circumstances afforded strong evidence of a release ; and that where a man promised to forgive his debtor, it must be presumed that he intended to do it by legal and competent means ; and as that could only be by a release under seal, it was to be presumed that a release had been executed. The case being left to the Jury, they found for the defendant. And see 6 Ves. 516 ; *et supra*, 1227.

(c) *Lampon v. Corke*, 5 B. & A. 606, *supra*. *Jacob v. Rowntree*, 2 Taunt. 164 ; *infra*, note (e).

(d) *Ibid.* and *vide supra*, Vol. I. 303.

(e) *Supra*, Vol. I. p. 303. In the case of *Rowntree v. Jacob*,

* In a case where a fraudulent release is set up in answer to a just debt, it would, it seems, be both * inconve-

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2 Taunt. 141, the plaintiff, in an action for money had and received, proved the receipt of 103*l.* as prize-money by the defendant, who was a prize agent, on the plaintiff's account. The defendant proved in answer a deed of assignment of the whole of the plaintiff's pay, &c. purporting to have been made to the defendant in consideration of 100*l.* in hand paid at or before the delivery thereof, and a receipt in the plaintiff's hand-writing was indorsed on the back. There was also evidence that the plaintiff had acknowledged the receipt of 15*l.* from the defendant.—On the other hand, it was proved, that no money passed at the time, and that no vouchers or receipts had been kept, and that the plaintiff was an extravagant and thoughtless man.—The plaintiff's counsel relied upon the whole of the circumstances to show that the matter relied on by the defendant was a gross fraud. But the Jury, relying on the plaintiff's execution of the deed, and signature to the receipt, found for the defendant. A motion being afterwards made for a new trial, and a rule *Nisi* granted, the Court ultimately discharged the rule. Heath, J. observing, that where a man by deed acknowledges himself to be satisfied, it is a good bar, without receiving any thing. Mansfield, C. J. entertained doubts upon the subject; but stated, that as his brethren were of opinion that a verdict against the evidence of a deed and receipt could not be supported, the rule must be discharged. In the marginal note affixed to this report, it is stated, that "if there has been an imposition in obtaining a deed, the relief must be in equity." This position, whether true or not, does not seem to be warranted by the case. The question of fraud seems (as far as can be collected from the report) to have been left to the Jury, but they, relying on the receipt as well as the deed, by their verdict negatived the imputed fraud. The circumstances were certainly far too slight to warrant any Jury in finding fraud against the evidence of the deed itself and the *plaintiff's signature* to the receipt, and the mere fact that the money was not actually paid at the time, was too slender a foundation for presuming fraud. The decision seems, indeed, from the language of the report, to have been founded upon the insufficiency of the evidence in the particular case, to establish fraud, and not upon the broad position that such an instrument could not be defeated at law by full and satisfactory proof of its having been obtained by fraudulent practices. On the contrary, it appears, that matters of fraud are in general cognizable by courts of law. Sir W. Blackstone, in his Comm. Vol. III. p. 431, after observing that it had been said, that fraud, accident, and trust, are proper and peculiar objects of a court of equity, observes, "but every kind of fraud is equally cognizable in a court of law, and some frauds are cognizable only there, as fraud in obtaining a devise of lands, which is always sent out of the equity courts to be there determined." And it has been determined in the House of Lords that a will of a real estate cannot be set aside in a court of equity for fraud or imposition, but must first be tried at law on *devisavit vel non*, being matter proper for a Jury to inquire into. Bac. Ab. tit. Fraud, D. and the cases there cited. In *Bright v. Eynon*, 1 Burr. 396, Ld. Mansfield says, that courts of equity and courts of law have a concurrent jurisdiction to suppress and relieve against fraud; but the in-

* 1294

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nient and inconsistent to prevent the plaintiff from defeating the instrument by proof of fraud, merely because the party might possibly obtain a remedy in equity; and when it is very possible that a court of equity might, the party guilty of fraud denying it upon his oath, again send the plaintiff to law to have his case tried by a Jury. The party may, by recourse to a court of equity, obtain an answer from his adversary on oath, an advantage which he could not obtain at law; but if he choose to wave that advantage, there seems to be no reason in law or equity why he should not at once impeach the deed for fraud, by evidence upon the trial.

* 1295

* REPLEVIN.

Right of property.

If issue be joined on the right of property, the plaintiff must prove either a general or special property in the goods or cattle at the time of the taking (a). A mere possessory right is insufficient (b).

Onus probandi.

Where the taking is admitted, and the affirmative of every issue lies on the defendant, as where he pleads *liberum tenementum* only, his counsel are entitled to begin and to reply (c).

terposition of the former is often necessary to give more complete redress; and *Ld. Loughborough, C.* in the case of *Bates v. Graves*, 2 Ves. Jr. 295, says, "Where the Court of Chancery has decreed a deed to be set aside for fraud and imposition, I must suppose that it would be equally set aside at law, upon pleading it. For courts of law relieve by making void the instrument obtained by fraud." *Wood's Inst.* 296. In the case of *Cockshott v. Bennett*, 2 T. R. 763. *Ashhurst, J.* says, "If this security be fraudulent, a court of law may avoid it, as well as a court of equity." See also *Ld. Kenyon's* observations in the same case. See 3 T. R. 551. In *White v. Hussey*, *Proc. in Chan.* 14, 15, it was said, that where a fraud can be clearly established, courts of law are competent to exercise a concurrent jurisdiction.

(a) *Bro. Repl. pl. 8. 20. Templeman v. Case*, 10 Mod. 25. Persons who have a joint interest in cattle or goods may join; 3 H. 4. 16; 1 Inst. 145. b. [See *Hart v. Fitzgerald*, 2 Mass. Rep. 509.] But where the interest is several, there should be several replevins; *Bro. Ab. Repl. pl. 12.* If the goods of a feme sole be taken, and she marries, the husband alone may sue, or they may join. *Bern v. Mattaire*, *Ca. Temp. Hardw.* 119. But if the goods be taken after marriage, they ought not to join; but after verdict, it will be presumed that they were jointly possessed before. *Ibid.* Executors may maintain replevin for goods of the testator, taken in his lifetime. *Bro. Repl. pl. 59.*

(b) 10 Mod. 25. [*Waterman v. Robinson*, 5 Mass. Rep. 304.]

(c) *Bulford v. Croke*, *Oxford Summ. Ass.* 1811. *Peake's L. Ev.* 5.

On issue taken on the plea of *non cepit*, it is incumbent on the plaintiff to prove the taking of the cattle or goods, or part of them, in the *place* specified in the declaration. But it is not essential to prove, that the cattle or goods were taken in that place originally. It is sufficient, under this issue, or on issue joined on a traverse of the taking in the place specified in the declaration, to prove a detention of them by the defendant in that place; for it is a continuance of the original wrong (*d*). But the plaintiff would fail, unless he showed either an original taking of the goods, or a subsequent possession and detention of them there (*e*).

Non cepit.

* The defendant, under this issue, which merely denies the taking, cannot dispute the ownership. * 1296

Non tenuit.

Upon issue taken on a plea of *non tenuit modo et forma*, or of *non demisit*, &c. in bar of an avowry for rent in arrear, the defendant must prove the holding as alleged in the plea. But a variance as to the quantum of rent due will not be material, provided the terms of the holding be proved as laid.

Where the defendant made cognizance for rent for two years and a quarter, ending on a day specified, it was held to be sufficient to prove that he was entitled to rent for two years, ending on that day (*f*).

A verdict for a defendant, who made cognizance as the bailiff of *A. B.*, is conclusive, as to the tenancy, in an action between the same plaintiff and the landlord (*g*).

Coparceners must join in an avowry for rent in arrear (*h*).

A joint-tenant may distrain for the whole rent, but he ought to avow for part only in his own right, and make cognizance, as bailiff, of the rest (*i*).

(*d*) *Walton v. Kersop*, 2 Wils. 354.

(*e*) *Johnson v. Wollyer*, 1 Str. 507; B. N. P. 54. *Abercrombie v. Parkhurst*, 2 B. & P. 481.

(*f*) *Forty v. Imber*, 6 East, 434.

(*g*) *Hancock v. Welch*, 1 Starkie's C. 347. A plaintiff in replevin is not estopped by an attornment made by him after an ejectment brought seven years before the commencement of the replevin-suit, during which no rent had been demanded, from proving a feoffment to himself from the person under whom the avowants claim. *Gravenor v. Woodhouse*, 1 Bing. 38. See *Supra*, tit. Ejectment. See *Rogers v. Pitcher*, 6 Taunt. 202; *Doe v. Ramsbotham*, 3 M. & S. 516; *England v. Slade*, 4 T. R. 682, *supra*, tit. Ejectment, 533.

(*h*) 1 Ld. Raym. 64.

(*i*) 12 Mod. 96; Bac. Ab. tit. Joint-tenant, K.; 5 Mod. 151; *Thomps. Ent.* 264; 3 Salk. 207. So for Distress, Damage feasant. *Ibid*.

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Non tenuit.

* 1297

Tenants in common must sever in an avowry for rent (*k*); but one cannot avow alone for taking cattle damage-feasant, without making cognizance, as bailiff, of the rest (*l*).

The general principle already adverted to (*m*) precludes * the plaintiff from disputing his landlord's title under this plea, even although the landlord has obtained possession by fraud (*n*), whilst he continues in possession under the avowant who first let him into possession (*o*). But he may rebut the presumption derived from the mere fact of his having paid rent to one from whom he did not derive his original possession, by proof that the rent was so paid, through ignorance, to one who had in reality no title (*p*).

Proof that the plaintiff was let into possession of land under an agreement for a lease, before the lease was executed, is not evidence of a demise during the first year of such possession (*q*).

Rents in arrear.

Upon issue taken on the plea in bar to an avowry for rent, that no rent is in arrear, the demise is admitted as alleged in the avowry; and it is incumbent on the plaintiff to prove that it has been satisfied. And the defendant

(*k*) Co. Litt. 188. b.; 5 T. R. 249.

(*l*) 1 Roll. Ab. 228. W. Jones, 283; Thel. Dig. 27; 5 T. R. 249. *Culley v. Spearman*, 2 H. B. 386.

Where the avowry alleged that the plaintiff and *J. B.* were joint-tenants under a lease, and *J. B.* was rejected as a witness for the plaintiff, on the *voir dire* without examination, for the purpose of explaining his situation, a new trial was granted. *Bunter v. Warne*, 1 B. & C. 689.

The declarations of the party under whom the defendant in replevin makes cognizance are not admissible against the defendant, for the party may be called as a witness. *Hart v. Horne*, 2 Camp. 92.

Where the landlord, after distraining on the under tenant, avows in the name of the tenant, the latter is not a competent witness for the landlord. *Upton v. Curtis*, 1 Bingh. 110.

(*m*) *Supra*; 534. The stat. 11 G. 2. c. 19. s. 22, permitting the landlord to avow generally, without setting forth the demise or his title; the plaintiff can neither plead *nihil habuit in tenementis*, nor give such matter in evidence under the plea of *non tenuit*, or *non demisit*. *Sullivan v. Stradling*, 2 Wils. 208.

(*n*) *Parry v. House*, Holt's C. 489.

(*o*) See *Rogers v. Pitcher*, 6 Taunt. 209.

(*p*) *Ibid.* The plaintiff held under *A. B.*, and afterwards paid rent to the defendant, to whom a moiety of the estate had been delivered under a writ of *elegit* against *A. B.*, and the plaintiff was permitted to show that, previous to the defendant's judgment, *A. B.* had conveyed the premises to a creditor, in satisfaction of a debt which entitled the latter to distrain.

(*q*) *Hegan v. Johnson*, 2 Taunt. 148.

will be entitled to a verdict if it appear that rent is in arrear to a less amount than is alleged (r), although a specific sum be alleged to be in arrear (s); for the substance of the issue is, whether any rent be in arrear.

PART
IV.

Riens in arrear.

The plaintiff cannot, under this issue, prove payment to one who claims by a superior title under a threat of distress (t).

* Where issue was joined upon *non tenuit*, and also upon the plea of *riens in arrear*, it was held, that the first issue being found for the plaintiff, the second became immaterial; and that the proper course was to discharge the Jury from giving a verdict, but that if any verdict was entered, it must be for the plaintiff (u). * 1298

If the plaintiff traverse the fact, as alleged in the cognizance, that the defendant is bailiff to the party under whose authority he distrained, evidence of a subsequent ratification and approval of the act will be sufficient, although there was no prior command given (x).

Traverse that the defendant is bailiff.

In the case of an avowry for rent in arrear, the avowant ought to be prepared with proof not only of the amount of the rent, but also of the value of the distress; for the stat. 17 C. 2. c. 7, enacts, that if the plaintiff be nonsuit after cognizance or avowry, and issue joined, or if the verdict be given against the plaintiff, the jurors impannelled to try the issue shall inquire of the sum in arrear, and the value of the goods or cattle distrained, and that the avowant, or he that makes cognizance, shall have judgment for such arrears, or so much as the goods or cattle distrained amount to. An omission to find the value of the distress cannot be supplied by a writ of inquiry (y).

Amount of rent and value of distress.

* The proof of a prescriptive right of common, where is- * 1299

(r) *Harrison v. Barnby*, 5 T. R. 246; 2 B. & A. 249.

(s) *Cobb v. Bryan*, 3 B. & P. 348.

(t) *Taylor v. Zamira*, 6 Taunt. 524. 2 Marsh. 220. Such a payment ought to be pleaded specially. *Ibid.*

(u) *Cossey v. Diggon*, 2 B. & A. 546.

(x) *Trevilian v. Pine*, 11 Mod. 112; Vin. Ab. tit. Bailiff, D.

(y) 1 Lev. 255; Rep. Temp. Hardw. 297; 2 Bl. Rep. 763. *Rees v. Morgan*, 3 T. R. 349. But the avowant, &c. would still be at liberty to take his judgment as at common law, for the statute does not extinguish the common-law right. 3 T. R. 349. *Baker v. Lade*, Carth. 254. And where the plaintiff in replevin is nonsuit, the defendant is not bound to have his damages assessed under the statute, or take the earliest opportunity to prosecute his writ *de retorno habendo*. And he may distrain the same goods for rent subsequently accrued, previous to suing out the writ *de retorno habendo*, without waving his action against the sureties on the bond. 1 Taunt. 218.

PART
IV.

Damage-feasant.

sue is taken on such a plea, when pleaded in bar of an avowry, for taking cattle, damage feasant, is considered in another place. In general, evidence of a more limited right than that alleged will be insufficient (z). But evidence of a more ample right will support the plea (a). Thus, if the plaintiff prescribe for a right of common for sheep, his replication will be supported by evidence of a right of common for cows as well as for sheep (b).

Where the lord has distrained, and issue is taken on the levancy and couchancy of cattle, proof that part only were levant and couchant will not support the issue (c).

Tender of
amends.

Where issue is taken on a plea of tender of amends to the person entitled to receive them, it seems, that evidence of a tender to the bailiff making the distress, the principal being present, is insufficient. But if a distress be made by a bailiff, in the absence of the principal, and the bailiff be proved to be his usual receiver, a tender to the latter seems to be equivalent to a tender to the principal (d).

Replevin-
bond.

The sureties in a replevin-bond are not liable beyond the penalty of the bond and costs of suit (e).

* 1300

* RES INTER ALIOS.

Res inter alios.

THE rule that no man shall be concluded, or even prejudiced, by the acts, declarations, or conduct of strangers, as it is founded on the most simple principles of natural justice, has ever been regarded by the law as sacred and inviolable.

As a rational being and moral agent, every one is, to a greater or less degree, responsible for his own acts and conduct, though not for those of others.

- (z) *Supra*, tit. *Prescription*.—*Common*. And see *Pring v. Henley*, B. N. P. 59. *Rotheram v. Green*, Cro. Eliz. 593; B. N. P. 60.

(a) *Supra*, tit. *Prescription*.

(b) *Bushwood v. Pond*, Cro. Eliz. 722. *Bailiffs of Teakesbury v. Bricknell*, 1 Taunt. 142.

(c) *Sloper v. Allen*, 2 Roll. Ab. 706; B. N. P. 299; *supra*, 390.

(d) Gilb. on Replevin, 89.

(e) *Hefford v. Alger*, 1 Taunt. 218. Sureties on a replevin-bond are not discharged by giving time to the plaintiff. *Moore v. Bowmaker*, 6 Taunt. 379; 2 Marsh. 392.

Declaration against a surety; plea, that the plaintiff in replevin did prosecute his suit, and that it is still depending; issue being taken on a traverse of the prosecution, upon evidence, that after the removal of the cause into the court above, the landlord and tenant entered into an agreement to stay proceedings, the surety was held to be liable. *Hodlett v. Mount Stephen*, 2 D. & R. 343.

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IV.

Res inter alios.

As against himself, it is fair to presume that every man's words and actions correspond with the truth; it is his own fault if they do not; but it would be in the highest degree rash and unjust to found such a presumption, generally, upon the acts, conduct, or declarations of strangers, without any authority from the party whom they affect.

Many of the illustrations of this rule have already been adverted to. No declaration, or written entry (a), or even affidavit made by a stranger, is evidence against any man. Neither can any one be affected, still less concluded, by any sentence, decree, or judgment, in any suit or legal proceeding to which he was not actually, or in consideration of law, privy (b).

It is evident that this objection can never operate to the exclusion of any statement, recital, or entry of a fact, which the law regards as a proper and safe medium for conveying the truth to a Jury; for there the evidence is admissible, because it is in itself, and in its connexion with circumstances, deserving of * credit, and it is no more *res inter alios* * 1301 than the fact itself is. Nor does the objection ever apply where the conduct or declaration of another operates not by way of admission or mere statement, but as evidence, from its connexion with the fact itself. Thus, if A. make a private memorandum of a fact, in which B. has an interest, that memorandum, generally speaking, would not be evidence against B.; it would fall within the description of *res inter alios*; but if it were a memorandum of a fact peculiarly within the knowledge of A., and made in the usual course of business, and especially if A. by that entry charged himself, it would be admissible in evidence after the death of A.; not that it operates against B. by way of admission of the fact, for if so it would be admissible, whether A. were living or dead; but because, under those circumstances, the law considers the entry as a proper medium for communicating the original fact to the Jury, the testimony of A. himself being unattainable.

So the declarations of deceased persons, and evidence of reputation, in matters of public prescription and pedigree, are admissible, not because strangers have any power to conclude a party by what they may choose wantonly to assert upon the subject, but because the law considers the evidence to be sufficiently deserving of credit, as a means of communicating the real fact, to be offered to a Jury. And whenever that is the case, it is obvious

(a) *Supra*, Vol. II. p. 42, 3, 4.

(b) *Supra*, Vol. I. p. 185. 191.

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IV.

that such declarations or reputation are no more *res inter alios* than if the declarants themselves had stated what they knew upon oath to the Jury.

Many of the applications of this principle are adverted to under the particular heads to which they belong.

* 1302
Admissions.

A man is affected, in a greater or less degree, by * all his own admissions, and by the inferences to be derived from his conduct. Some of these are so strong in their nature that they do not act merely as evidence, but possess a still superior effect annexed to them by the law, on grounds of legal policy and convenience. Thus, a solemn admission under the seal of the party does not operate as mere evidence, but is absolutely conclusive as to the fact admitted (*m*). In other instances, a representation made by one party, on the faith of which he has induced another to act, and thereby gained an advantage to himself, is usually conclusive upon the former, although it does not amount to an absolute estoppel in law (*n*).

And again, a mere collateral and casual representation is always evidence against the party who made it, although it is usually inconclusive in its nature (*o*).

By agents.

The operation of the principle branches out still more widely in its application to acts or admissions made by others, but authorized or assented to by the party, and to which he may be considered to be privy. He is bound by the acts and admissions of his agent to the extent of the authority delegated to him (*p*). By all acts done by others in pursuance of a general object, whether it be legal in its nature; as where partners embark in a joint trade (*q*), or illegal, as in the case of a conspiracy; for there, in effect, the act or declaration of one, in endeavouring to achieve the common purpose, is the act and declaration of all (*r*).

* 1303
judgments, decrees, and judicial proceedings * between parties (*e*), and their privies (*f*) in matters of a private nature.Public and
judicial pro-
ceedings.

The principle also extends to the admission of all judicial and other proceedings of a public nature, for to these all are parties. Thus a judgment *in rem*, and all surveys and inquisitions which are of a public nature, and made under authority, are, it has been seen, generally admissible, as to the facts which they contain.

(*m*) *Supra*, Vol. I. p. 302.

(*n*) *Supra* 31.

(*o*) *Supra*, 34.

(*e*) Vol. I. p. 185. 191.

(*p*) *Supra*, 42.

(*q*) *Supra*, 45.

(*r*) *Supra*, 47. 405. 409.

(*f*) Vol. I. p. 185. 192.

PART
IV.Confession by
a principal.

There are some points as to the admissibility of declarations made by third persons, particularly in criminal proceedings, which merit further consideration; it has been seen, that a confession by *B.* of his own guilt, and also of that of *A.*, although forcible evidence against *B.*, would not be admissible against *A.* (*g*), to prove the guilt of *A.*; notwithstanding this, if *B.* be the principal in a felony, and *A.* accessory before the fact, it seems that the confession by *B.* of his own guilt would be evidence to establish that fact mediately against *A.* In practice, where the principal and accessory are tried together, such evidence is received to prove the guilt of the principal, although it mediately affects the accessory; hence it seems to be also admissible for the same purpose, that is, in order simply to prove the guilt of the principal where the accessory is tried separately (*h*), for the mere circumstance that the accessory is tried with the principal cannot make that evidence admissible which would be inadmissible in case they were to be tried separately; it has also been seen, that the record of the conviction of the principal is *prima facie* evidence to prove the guilt of the principal (*i*). Hence, again, it seems to follow that the confession of the principal, * would also, in such case, be admissible against the accessory, in order merely to establish the guilt of the principal, for it would be inconsistent to admit the record of the conviction, which may have been founded solely on the confession of the principal, and yet to exclude the confession itself. It would manifestly be to the advantage of the accessory, that the confession should be given in evidence, rather than the conviction founded upon it, for he would by that means have an opportunity of cross-examining the witnesses in order to impeach the confession. If the matter were to be strictly investigated, it would probably appear that the declaration of the principal, as to the fact of his own guilt, did not fall within the general objection against hearsay evidence, which is founded upon experience that no reliance can safely be placed on assertions made by strangers, whose means of knowledge, and whose inclination to declare the truth are equally uncertain.

But such objections can have little application to the case of a principal felon, who not only knows the fact, but is probably the only person who knows it, and to whom a considerable degree of credit is due, when he acknow-

(*g*) *Supra*, 53.(*h*) See *R. v. Smith*, Leach, C. C. L.(*i*) *Supra*, 14.

PART
IV.

Confession by
a principal.

Conviction of
a principal.

* 1305

ledges his own guilt, and subjects himself to punishment. The confession of the principal does not operate to his conviction on the ground that, as against him who has confessed the fact, his confession must be taken to be true, whatever the real opinion of the Jury may be, for they are not warranted in convicting unless they are fully satisfied upon that evidence, that he is actually guilty; but if such evidence be sufficient to convince them of the fact, it is difficult to say that the same evidence is wholly inadmissible to prove the very same fact against the accessory.

Sir Michael Foster (k) makes the conviction of the * principal to be evidence against the accessory, as far as relates to the guilt of the principal, upon the legal presumption that all things were *rite acta* in the former proceeding. It may, however, be doubted, whether this reason be sufficient in principle to warrant the admission of such evidence, when it is considered how frequently the same reason might be urged where such evidence is decidedly inadmissible (l), and how often it happens that a verdict in a criminal case is not admissible, even as against the convicted party himself, in a different proceeding, although he had an opportunity of cross-examining witnesses, and rebutting their testimony, by proof to the contrary upon the former trial, which the accessory, when tried separately, had not an opportunity of doing. And this is the material difficulty. Sir M. Foster indeed, himself says, as against the accessory, the conviction of the principal will not be conclusive, it is as to him *res inter alios acta*. But if it be really so, it is difficult to conceive how it is evidence at all against the accessory to prove so important a fact. Sir M. Foster does not appear to have been perfectly satisfied with the reason which he had given, for he adds, in a subsequent part of the same chapter, "I have already premised, that in order to convict the accessory, it is not necessary to enter into a detail of the evidence upon which the principal was convicted; and have offered some reasons for my opinion. Another weighty reason occurreth, which it will be sufficient just to mention; the witnesses against the principal may be dead, or not to be found when the accessory is brought to his trial, especially after a long interval between the trials." It must, however, be admitted, that this difficulty does not satisfactorily account for the reception of such evidence, supposing it * 1306 to be otherwise inadmissible; * and if it be clearly admis-

(k) Foster, 365.

(l) *Supra*, Vol. I. 216.

sible on principle, it is dangerous to resort to the plea of necessity. The situation of the parties in such a case is most peculiar, the accessory is privy in guilt to all the acts of his criminal agent, and yet he may be actually ignorant of the circumstances attending the consummation of the crime. It is reasonable to suppose, that the principal would, if really innocent, have repelled the charge, had he possessed the means of doing it, which the mere accessory could not be supposed to possess; and as he was unable to defend himself, it is highly improbable that the accessory would, had he been called upon to do so, have succeeded better; considering the *criminal privity* between the parties, and the opportunity of defence already afforded, the law may, perhaps, justly consider that the accessory has already had an opportunity of repelling the charge by the agency of his partner in crime, yet not so far as to exclude him from still impeaching the conviction. To a certain extent, the conviction of the principal operates *in rem*; thus it is conclusive against the alienee of lands which belonged to the attainted felon" (m). And so strongly was his conviction supposed to operate, even against the accessory, that the doubt has been, not whether it was admissible evidence to prove the fact, but whether it was not absolutely *conclusive* (n), and it is sufficient to allege the mere conviction of the principal felon, in an indictment against the accessory (o).

It has been seen, that upon the trial of an information *quo warranto*, the judgment of ouster against a corporator is evidence, although not conclusive, to impeach the title of the defendant, who claims through that corporator (p).

* 1307

* RULE OF COURT.

THE production of a rule of Court is usually sufficient, without further authentication; for it is an original, whether it be a rule of the same or of a different court (s).

It has been seen, that the production by the defendant of a rule to pay money into Court, does not, according to the practice of the Court of Common Pleas, at least, give the plaintiff's counsel a right to reply (t). The production of a rule of court for committing a defendant convicted of a misdemeanor to a gaol, to be imprisoned for a term, according to his sentence, is evidence to prove an allega-

(m) Vol. I. p. 224.

(o) Foster, 365.

(n) Foster, 365.

(p) *Supra*, 1264.

(s) *Selby v. Harris*, 1 Ld. Raym. 745, per Treby, J.

(t) 2 Taunt. 267, *supra*.

PART
IV.

tion that he has received judgment of imprisonment for that term (q).

SEDUCTION.

In an action (a) for debauching the plaintiff's daughter and servant, *per quod servitium amisit*, it is necessary to prove, 1st. That the daughter resided with the plaintiff, and that she performed some acts of service for him. But services of the most trifling nature are sufficient for the purpose; the relation of master and servant being, in such cases, little more *than matter of fiction; made use of to support the action. And therefore it is unnecessary to prove any contract of service (b). And the action is maintainable, although the daughter be of age, if she reside with her father (c) (2).

* 1308

Proof of service.

But although the daughter be a minor, yet if she reside in another person's family, at the time of the seduction, without an intention to return to her father, the latter cannot maintain the action, although she actually returns to him whilst under age, in consequence of the seduction, and is maintained by him (d) (3). Otherwise, if she be

(q) *Carlile v. Perkins*, Cor. Abbott, C. J. Westminster Sitt. after Mich. T. 1822. But see *Woodroafe v. Williams*, 6 Taunt. 19.

(a) The action is usually laid in case; but where the offence has been accompanied with an *illegal* entry in the father's or master's house, it may be laid by way of aggravation in trespass *quare clausum fregit*. *Bennett v. Alcott*, 2 T. R. 167. *Woodward v. Walton*, 2 N. R. 476. *Macfadzen v. Olivant*, 6 East, 367. And a count may be joined for assaulting the daughter. 2 N. R. 476.—(1).

(b) *Bennett v. Alcott*, 2 T. R. 166. And see *Woodward v. Walton*, 2 N. R. 476. *Jones v. Brown*, Peake's C. 233.

(c) *Booth v. Charlton*, cited 5 East, 47.

(d) *Dean v. Peel*, 5 East, 45.

(1) [An action by a father for debauching his daughter, may be either trespass or case. *Parker v. Elliott*, Gilmer, 33. Case may be brought by a father for the loss of his daughter's service, and expenses incurred by him in consequence of her being debauched and got with child, no forcible injury to himself or his property being alleged in the declaration. *Parker v. Elliott*, 6 Munf. 587. It will be found, upon examination of the American cases on this subject, that no settled form of action is adopted, but that case and trespass are brought indifferently.]

(2) [Where the daughter is above the age of twenty-one years, the father cannot maintain an action, unless she is actually in his service, so as to constitute the relation of master and servant. *Nickleson v. Stryker*, 10 Johns. 115.]

(3) [In *Martin v. Payne*, 9 Johns. 367, this doctrine was wholly

merely absent with his consent, and with the intention of returning, even although she be of age (e); or if it be proved, that the defendant engaged her as a servant, and induced her to live in his house as his servant, with intent to seduce her (f).

PART
IV.

Proof of service.

If the daughter has a fixed residence in another family, the person with whom she resides may maintain the action (g). And the Jury, in such a case, are not limited in

(c) *Johnson v. Mac Adam*, cited 5 East, 47.

(f) *Speight v. Olivier*, 2 Starkie's C. 493.

(g) *Irwini v. Dearman*, 11 East, 24. *Dean v. Peel*, 5 East, 45. *Edmonson v. Machol*, 2 T. R. 4.

denied. A daughter of the age of 19 years, with the consent of her father, went to live with her uncle, for whom she worked when she pleased, and he agreed to pay her for her work; but there was no agreement for her continuance in his house for any time. While in her uncle's house, she was seduced, &c. and immediately afterwards returned to her father's house, where she was maintained, and the expense of her lying-in paid by him; though, if the misfortune had not happened to her, she had no intention of returning to her father: It was held that an action on the case was maintainable by the father against her seducer; the father not having divested himself of his power to reclaim the services of his daughter, and the relation of master and servant was presumed from his right to her services, arising from his liability to maintain and provide for her while under age. So in *Horaketh v. Barr*, 8 Serg. & Rawle, 36, it was held that a father may maintain an action for the seduction of his minor daughter, *per quod servitium amisit*, though at the time she did not reside with him; provided she was subject to his control, and he was entitled to command her services. *S. P. Vanhorn v. Freeman*, 1 Halsted's Rep. 392. And it seems that such action will lie, although the loss of service appears to have arisen from distress of mind, and not to have been occasioned by pregnancy. 1 Halsted's Rep. *ubi sup.*

In *Mann v. Barrett*, 6 Esp. C. 32, it was held that if a daughter performs all the duties of a servant, and all domestic offices in her father's house, though she does not sleep there, yet if she be seduced, the father may support an action, *per quod servitium amisit*.

In *Applegate v. Ruble*, 2 Marsh. (Ken.) Rep. 129, it was decided that if the declaration, in an action for seducing the plaintiff's daughter, avers the daughter to be the plaintiff's servant, it is good, though the averment of the daughter's infancy be omitted.

In *Logan v. Murray*, 6 Serg. & Rawle, 175, the Supreme Court of Pennsylvania decided that an action cannot be maintained by a mother for debauching her daughter, *per quod servitium amisit*, where the seduction was during the life time of the father with whom the daughter resided at the time; although after the father's death, she remained with the mother, who was at the expense of her lying-in, and who supported her and her child. - In *Coom v. Moffet*, 2 Penn. Rep. 583, the Supreme Court of New Jersey made a rectly contrary decision.]

**PART
IV.**

Seduction.

their verdict, to the mere damage arising from the loss of service (*h*).

The daughter is a competent witness to prove the seduction (*i*); and although it is not absolutely essential to call her as a witness, the omission to do so would be open to great observation (*k*) (*4*).

*** 1309
Damage.**

* The plaintiff must, of course, be prepared to prove the amount of the expenses to which he has been put, in supporting the daughter, and supplying her with the necessary medical attendance. It is not essential to show that an apothecary's bill has been actually paid, the plaintiff being liable to the payment. But it seems that, in such a case, he would not be entitled to recover for a physician's fees, unless they have been actually paid, for he is not legally liable to pay them (*l*).

The Jury, in a case of this nature, are not confined in their estimate of damages to the mere amount of the damage from loss of service and the expenses consequent upon the seduction, but may award a compensation for the dishonour and disgrace cast upon the plaintiff and his family by such an injury. The plaintiff should be ready to prove, in aggravation of damages, the state and situation of his family at the time (*m*), the conduct and demeanour of the defendant, and the terms upon which he was allowed to visit the family, as that he professed to visit the family as the daughter's suitor (*n*), and was received on that footing.

It has been said, that evidence to show that the defendant prevailed by means of a promise of marriage is inadmissible (*o*). This, however, seems in * principle to be very ques-

(*h*) *Irwin v. Dearman*, 11 East, 24.

(*i*) *Cock v. Wortham*, 2 Str. 1054.

(*k*) See *Farmer v. Joseph*, Holt's C. 451.

(*l*) *Dixon v. Bell*, 1 Starkie's C. 287.

(*m*) The plaintiff, it is said, may give evidence of the general good conduct of his family, and of the number of his other children in aggravation of damages. *Bedford v. McKissel*, 3 Esp. C. 119.

(*n*) *Elliott v. Nicklin*, 5 Price, 641.

(*o*) *Dodd v. Norris*, 3 Camp. 519. Peake's L. Ev. 355. And see the observations made upon this case in *Elliott v. Nicklin*, 5 Price, 641, and the observations of Garrow, B. who said the distinction is, where the actual promise of marriage is not relied on as a prominent part of the case, but is merely collateral to the main object of the action, as to vindicate the character of the young woman when assailed by the defence set up.

(4) [See *McFarland v. Shaw*, cited Vol. II. 463, note (1).]

tionable ; for this is to exclude evidence of the extent of the injury, and of the means used to perpetrate it, which, in all cases where the Jury are to assess the damages, seem to be material for their consideration. But no evidence of the daughter's general character for chastity is admissible until her character has been impugned on the other side (p) (1).

PART
IV.

Damages.

The defendant may, in mitigation of damages, adduce any evidence which tends to show that the consequence has, in part, resulted from the improper, negligent, and imprudent conduct of the plaintiff himself.

Defence.

Where a father permitted one whom he knew to be a married man to visit his daughter as a suitor, upon an alleged probability of a divorce, or of the death of the wife, Ld. Kenyon went so far as to hold that an action for seduction could not be maintained (q) (2). Other remarks belonging to this head have been made in another place (r).

To support an action for seducing or harbouring an apprentice or hired servant, the plaintiff must prove the contract of apprenticeship or service ; the fact of soliciting the apprentice or servant to leave the service ; with a knowledge of the fact, that he was at the time the apprentice or servant of the plaintiff ; or that the defendant harboured the party after notice of the contract, and a request to deliver him up.

Seduction of a
servant.

Proof that the defendant, being a captain on the recruiting service, asked the plaintiff's servant whether * he would enlist, and gave him money, is sufficient evidence of enticement (s).

* 1311

And proof of an indenture of service, by an infant negro

(p) *Bamfield v. Massey*, 1 Camp. 460. And it has been said, that an attempt to impugn her character on cross-examination is insufficient. *Dodd v. Norris*, 3 Camp. 519, or an attempt to prove a single act of unchastity before her acquaintance with the defendant, is insufficient to warrant general evidence.

(q) *Reddie v. Scoott*, Peake's C. 240.

(r) *Supra*, 369, 370, 1.

(s) *Keane v. Boycott*, 2 H. B. 511.

(1) [In *Aterley v. Haines*, 2 Caines' Rep. 292, it was decided that it is no defence to an action of this kind, that the daughter is unchaste, unless it be shown that the father connived at her criminal intercourse. In *Wallace v. Clark*, 2 Overton's Rep. 93, it was held that the general character of the daughter cannot be given in evidence, in an action by her father against her seducer.]

(2) [A father cannot maintain an action for debauching his daughter, if he has consented to, or connived at, her improper intercourse with the defendant. *Seagar v. Sligerland*, 2 Caines' Rep. 219.]

PART
IV.Seduction of a
servant.

slave, in the West Indies, by which the latter covenanted to serve for a term of years, entitles the master to recover from the seducer (t).

The plaintiff, in an action for seducing his servants, may recover damages, not merely for the loss of service, as calculated on the time for which they were engaged to serve, but on the whole consequential damage (u).

SET-OFF (a).

WHERE notice of set-off has been given, the defendant, to entitle himself to enter upon evidence * of the

(t) *Keane v. Boycott*, 2 H. B. 511.

(u) *Gunter v. Astor*, 4 Moore, 12; where the servants were hired to work by the piece, and the Jury having given 1,600*l.* damages, the Court refused a new trial.

(a) By the stat. 2 Geo. 2. c. 22. s. 13, where there are mutual debts between the plaintiff and defendant, or, if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate, and either party, one debt may be set against the other, and such matter may be given in evidence upon the general issue, or pleaded in bar, as the nature of the case shall require: so as at the time of pleading the general issue (*), where any such debt of the plaintiff, his testator or intestate, is intended to be insisted on in evidence, notice shall be given of the particular sum or debt so intended to be insisted on, and on what account it became due, or otherwise such matter shall not be allowed in evidence under such issue.

Where the defendant means to insist, that the sum sought to be recovered was intended in satisfaction of a debt due to him from the plaintiff, or in satisfaction of a claim which he had on the plaintiff, a notice, or plea of set-off, is unnecessary; the circumstances are admissible in evidence under the general issue. *Dale v. Sollett*, 4 Burr. 2133. And so it is where the assignees of a bankrupt sue; for by the stat. 5 Geo. 2. c. 32, s. 28, they cannot recover more than the balance due to the bankrupt. And see the statute 46 Geo. 3. c. 101.

There can be no set-off to an avowry for rent. *Sapsford v. Fletcher*, 4 T. R. 512. [See 6 Taunt. 524.] Nor, as it seems, to an action of *assumpsit*, for not accepting a bill of exchange at two months date, according to the contract upon a sale of goods; the action having been brought before the expiration of the two months. *Hutchinson v. Reid*, 3 Camp. 329. Nor to an action for breaches of covenant. *Warn v. Bickford*, 7 Price, 550.

Declaration for not providing for accommodation bills, whereby the plaintiff was obliged to pay the amount, and interest and expenses, a set-off cannot be pleaded. *Hardeastle v. Netherwood*, 5 B. & A. 93.

Unliquidated damages cannot be set off. *Freeman v. Hyatt*, 1

(*) The plea of *non est factum* is not a general issue for this purpose, *Oldershaw v. Thomson*, 1 Starkie's C. 311; 5 M. & S. 164.

set-off, must first prove his notice according to the statute.

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Bla. Rep. 394. *Dowland v. Thomson*, 2 Bla. Rep. 910. *Howlett v. Strickland*, Cowp. 56. *Weigall v. Waters*, 6 T. R. 488. *Gillett v. Maxman*, 1 Taunt. 137.

A. guarantees to *B.* goods sold by him to *C.*, who becomes bankrupt. *A.* admits the amount of goods supplied, yet *B.* cannot set off the amount against *A.* *Crawford v. Stirling*, 4 Esp. C. 207; *secus*, if the damage to *B.* be adjusted between *A.* and *B.* *ib.*

In an action by a servant for wages, the master cannot set off the value of goods lost by the negligence of the plaintiff, although he has admitted his liability. *Le Loir v. Bristow*, 4 Camp. 134.

But where it was part of the original agreement, that the servant should pay, out of his wages, for all his master's goods lost by his negligence, the value may be deducted under the general issue. *ib.*

And a custom in trade to set off the amount of damages done to goods dyed, is a good defence under the general issue. *Bamford v. Harris*, 1 Starkie's C. 343.

Money agreed to be paid on breach of a condition of an agreement, as liquidated damages, may be set off. *Fletcher v. Dyche*, 2 T. R. 32. But uncertain damages, resulting from breach of covenant, cannot. *Weigall v. Waters*, 6 T. R. 488.

A manufacturer, who refuses to deliver goods ordered till the price be paid, or security given, may set off the amount as goods bargained and sold. *Dunmore v. Taylor*, Peake's C. 41.

The debt set off must be due from the plaintiff in the character in which he sues to the defendant in the character in which he is sued. *Staniforth v. Fellows*, 1 Marsh. 184, *infra*.

An attorney cannot set off his bill for business done in court unless he has previously delivered a bill signed. *Bulman v. Birkett*, 1 Esp. C. 449. But it is not necessary that a month should intervene between the delivery of the bill and the trial. *Ibid.*

A. B. and *C.* having delivered bills to *D.* for a specific purpose, the assignees, under a commission of bankruptcy against *A.* and *B.*, bring an action against *D.* for the proceeds; *D.* cannot set off a debt due from *A. B.* and *C.* *Staniforth v. Fellows*, 1 Marsh. 184.

As to set-off in actions brought by assignees of a bankrupt, *Vide supra*, 196.

Where the defendant had sustained a loss by means of *A. B.*, which was fixed at 1,900*l.*, and *A. B.* engaged that he would, for the space of four years, recommend certain parcels of cotton to the defendant, which he should purchase by notes at three months date, and engaged, at the expiration of four years to pay him that sum, if the profits did not amount to so much, and *A. B.* became bankrupt, it was held that such sum could not be set off against the assignees. *Hancock v. Entwistle*, 3 T. R. 435.

A., before his bankruptcy, deposits a bill with *B.* to raise money, and *B.* advances money to *A.* on the credit of the bill. *B.* has not a lien on the bill for the general account, but only for so much as he has advanced on the particular bill. *Key v. Flint*, 1 Moore, 451. [8 Taunt. 21. S. C.]

Where *A.* purchased of *B.* two parcels of goods at different times, and to be paid for at different times, and when the first became due, *A.* lodged in *B.*'s hands a bill of exchange for a larger amount than the first parcel, *B.* engaging to return the overplus

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* Whether the set-off be pleaded, or notice be given, the defendant must prove his demand as if he were plaintiff.

when the bill should be paid, and *B.* received the amount of the bill, and then *A.* became a bankrupt, it was held, that in an action by *A.*'s assignees for the surplus of the bill, *A.* might retain it to satisfy the demand of *A.* for the second parcel of goods. *Atkinson v. Elliott*, 7 T. R. 378.

Where a creditor of the bankrupt purchases goods from the bankrupt after an act of bankruptcy, but more than two months before the commission, he is entitled (since the 46 Geo. 3. c. 101. s. 3), to set off the debt due to him in an action by the assignees for the value of the goods. *Southwood v. Taylor*, 1 B. & A. 471.

Goods are pledged to secure a debt, part of which is paid before act of bankruptcy; after an act of bankruptcy fresh advances are made, this is not a case of mutual credit within the statute of 5 Geo. 2. c. 30. s. 28.

The statute is confined to demands on such credits only as will in their nature terminate in a debt. *Rose v. Hart*, 2 Moore, 547. [8 C. 8 Taunt. 499.] A guaranty against contingent damages is not within the statute. *Sampson v. Burton*, 2 B. & B. 89.

Where the executors of an underwriter sue a broker for premiums, the defendant cannot set off returns of premium which became due after the testator's death. *Houston v. Robertson*, 4 Camp. 342.

Where *A.* being appointed by *B.* to receive his rents, after the death of *B.* received money due to him in his life-time, it was held, that *A.* could not set off against the executrix of *B.*, who brought an action for this debt in her own name, a debt due to him from the testator; for the testator himself never had any cause of action against the defendant. B. N. P. 180. *Shipman v. Thomson*, C. B. 11 Geo. 3. See *Rogerson v. Ladbroke*, 1 Bing. 93.

A debt due to a man in right of his wife cannot be set off in an action against him on his own bond. B. N. P. 179. *Paynter v. Walker*, East, 4 Geo. 3. *Cook v. Dixon*, B. R. 1735.

A debt due from the wife *dum sola*, cannot be set off in an action brought by the husband alone. *Wood v. Akers*, 2 Esp. C. 594. unless the husband has made himself individually liable. *Ibid.*

A defendant sued for his own debt may set off a debt due to him as surviving partner. *Slipper v. Stidstone*, 5 T. R. 493. *French v. Andrade*, 6 T. R. 582; and see *Smith v. Barrow*, 2 T. R. 478.

In an action brought by an ostensible and dormant partner, the defendant may set off a debt due from the ostensible partner alone. *Ross & another v. Decy*, 2 Esp. C. 469. n. Cor. Kenyon, C. J. and *vide tit. Partner.*

A. and *B.* indorse a note to *B.* given them by *C.*; in an action by *B.* (who carries on trade separately) as indorsee against *C.*, the latter may set off a debt due from *A.* and *B.* *Puller & others v. Roe & others*, Peake's C. 197. Cor. Kenyon, C. J. See *Ex parte Harrow*, 12 Ves. 346. *Ex parte Stephens*, 11 Ves. 27. *Ex parte Truogood*, *ib.* 517; and *Fair v. M'ker*, 16 East, 130, *infra*, 1317.

The different situations in which the buyer and seller, and their factor or broker, are placed in relation to each other, afford frequent discussions as to the right of set-off, especially where the bankruptcy of one of the parties has intervened. The great prin-

*The proof of the set-off must, of course, correspond with the plea or notice of set-off. Nearly the same

fact
it.

ciple upon which many of these cases turn, is this, that where the name of the principal is disclosed, the principal vendor and vendee are the creditor and debtor, although the agent in selling acted under a *del credere* commission.

If a *factor*, upon a *del credere* commission, sell goods as his own, and the buyer know nothing of the principal, the buyer may set off any demand which he may have on the factor against a demand for the goods made by the principal. *George v. Claggett*, 7 T. R. 359. *Rabone v. Williams*, 7 T. R. 360. n. But a *broker* in selling goods without disclosing the name of his principal acts beyond the scope of his authority, and the buyer cannot set off the debt from the broker. *Baring v. Corrie*, 2 B. & A. 137.

Where a broker sold goods to *Smith & Co.*, on a commission *del credere*, from *Mesurier*, and re-sold the goods by direction of *Smith and Co.*, and afterwards disclosed the name of his principal to *Smith & Co.*, and after the expiration of the credit to *Smith & Co.* paid the proceeds to *Mesurier*, it was held that the broker could not, in an action by the assignees of *Smith & Co.*, who became bankrupts, set off the payment to *Mesurier*. *Morris v. Cleasby*, 4 M. & S. 566. For the defendant having sold to *Smith & Co.*, as broker, and having disclosed the name of his principal to *Smith & Co.* before the relative rights and situation of the parties were altered, it was the same thing as if the disclosure had taken place at the time of the sale. *Ibid.* And see *Gurney v. Sharp*, 4 Taunt. 242. *Cutwning v. Forester*, 1 M. & S. 495. *Koster v. Eason*, 2 M. & S. 112. The case of *Greve v. Dubois*, 1 T. R. 112, is distinguishable from that of *Morris v. Cleasby* in this respect, that, in the latter, the name of the principal was disclosed before any transaction on which the defendants claim was founded took place. See also *Morris v. Cleasby*, 1 M. & S. 576; where, under the same circumstances as in *Morris v. Cleasby*, 4 M. & S. 566, except that it was doubtful whether the defendant had disclosed the name of his principal before or after the payment to *Mesurier*; the Court granted a new trial, in order to ascertain the fact. But if the factor has a lien upon the goods, the vendee cannot set off a debt due to him from the principal, although the name of the principal be disclosed at the time of sale. *Atkyns v. Amber*, 2 Esp. C. 493.

An auctioneer permits goods, sold by him, to be taken away by the purchaser, after an intimation of the purchaser's claim against the principal; the purchaser may set off his claim in an action brought by the auctioneer; *secus*, if the goods had been sold in his own name, or if he had had a lien upon them. *Jarvis v. Chapple*, 2 Chitt. R. 57.

By the stat. 8 G. 2. c. 24, mutual debts may be set off against each other, notwithstanding such debts are of a different nature, unless where either of the debts shall accrue by reason of a penalty contained in any bond or specialty; and in all such cases the debt intended to be set off shall be pleaded in bar, in which plea shall be shown how much is truly and justly due on either side; and in case the plaintiff shall recover, judgment shall be entered for no more than is justly due, after setting one debt against the other. In an action on a bond, the defendant in his plea of set-off must show what is really due on the bond, and the averment is traversable. *Symmons v. Knox*, 3 T. R. 65. *Grimwood v. Barritt*, 6 T. R. 460.

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Variance.

Against as-
signees of a
bankrupt.

* degree of certainty in the notice and proof seems to be necessary, as, if the defendant had brought his action * for the subject-matter of the set-off (b). Under the set-off for money paid to the plaintiff's use, the defendant may prove that he has paid bills of exchange and promissory notes for the plaintiff at his request (c). And under a set-off for money had and received to the use of the defendant, the payment of bills by the defendant to the plaintiff is presumptive evidence to prove the set-off, without actual proof that the amount has been received by the plaintiff (d).

Where the defendant sets off against the assignees of a bankrupt notes payable to the bearer, issued by the bankrupt, and bearing date before the bankruptcy, he must prove further that the notes came into his hands before the bankruptcy (e); but it was held, that if the notes had been made payable to the defendant himself, the date would have been reasonable evidence of their having come to his hands at the time of the date (f).

* 1317 Proof that notes to the amount of the set-off came into the hands of the defendant three or four weeks before the bankruptcy, was held to be evidence for * the consideration of the Jury, to show that those were the notes produced in support of the set-off (h).

Where the defendant, in such a case, sets off the bankrupt's acceptances given in exchange for his own, he must prove either that the obligation on himself to pay the bills, in respect of which the acceptances were given, subsisted before the bankruptcy, or that there was a mutual credit created in the origin of the bills (i).

Answer to
set-off.

It may be shown by the assignees, in answer to a claim of set-off on a bill of exchange, that it was indorsed by a

(b) B. N. P. 179. Where it is said, that under a notice of set-off for use and occupation, the defendant cannot set off rent reserved by indenture of lease. *Fowler v. Jones*, Sitt. at West. Hil. 8 G. 2. [See *Gunn v. Scovill*, 5 Day, 113.]

(c) *Fletcher v. Lee*, Cor. Ld. Ellenborough, C. J. Sitt. after Mich. Term. 1817.

(d) *Hebden v. Hartink*, 4 Esp. C. 46. It has been said, that under a set-off for money had and received, the defendant, who seeks to recover for an over-payment, will not be allowed to take the plaintiff by surprise, by giving it in evidence under this set-off. *Hampton v. Jarratt*, 2 Esp. C. 560. Cor. Eyre, C. J. *sed quare*; for the plaintiff might have had a bill of particulars.

(e) *Dickson v. Evans*, 6 T. R. 57.

(f) *Ibid.*

(h) *Moore v. Wright*, 2 Marsh. 209. [6 Taunt. 517. S. C.]

(i) *Ouchterlony v. Easterby*, 4 Taunt. 888.

third person to the defendants, as a mode of covering the amount of a bill; for the defendants do not hold such bill in their own right, but, in effect, for the indorser (k).

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Where the set-off is not pleaded, the plaintiff may insist on the Statute of Limitations at the trial; for he had no opportunity of pleading it. Stat. of
Limitations.

It seems to have been considered, that where a set-off is pleaded, the plaintiff in order to avail himself of the statute must apply it specially (l). This, if it be law, imposes a great hardship on the plaintiff, for as he cannot reply more than one matter, he is placed in a worse situation than the defendant who can plead the statute, and also insist upon other defences. It seems to be highly unreasonable that, in one and the same action, the defendant should be indulged in making several distinct answers to the plaintiff's claim, and yet that the plaintiff, in his answer to a counter-claim on the part of the defendant, should be confined to one * answer. At all events, where the debt attempted to be set off is of long standing, the Jury may presume satisfaction from lapse of time and other circumstances (m). * 1318

The plaintiff cannot, after receiving the defendant's particulars of set-off, and keeping them, object at the trial that they were not delivered within the time directed by the Judge's order; he ought, it seems, to apply to the Court (n).

An allegation of an agreement to set off a specific joint debt against specific separate debts previously accrued, is proved by evidence of an agreement prior to the debts accruing, to set off all joint debts that should thereafter arise against all separate debts that should thereafter arise (o).

In *assumpsit* for goods sold and delivered, it is no answer to the defendant's plea, or proof of set-off after notice, that it was agreed that the goods should be paid for in ready money (p); or, that the defendant brought an action to

(k) *Fair v. M'Iver*, 16 East, 130.

(l) B. N. P. 180, where it is said, that if a debt barred by the statute be pleaded, the plaintiff may reply the statute. If it be given in evidence on notice, it may be objected to at the trial. *Remington v. Stevens*, 2 Stra. 1271. S. P. And see 1 Starkie's C. 343.

(m) *Cooper v. Turner*, 2 Starkie's C. 497.

(n) *Lovelock v. Clevely*, Holt's C. 552.

(o) *Kinnerley v. Hossack*, 2 Taunt, 170.

(p) *Eland v. Korr*, 1 East, 375. *Cornforth v. Rivett*, 2 M. & S. 510. But in estimating the plaintiff's damages, the Jury, it seems, should take into consideration the loss sustained from non-payment in ready money. *Ibid*.

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recover the same debt before the plaintiff's cause of action accrued (g); or, that the defendant has, at the same sittings, recovered a verdict for his debt (r); or, that the plaintiff, being indebted to the defendant, the defendant borrowed money under an express promise to repay it (s).

Effect of.

- * 1319 The plaintiff cannot use a notice of set-off as evidence of the debt, under the issue of *non assumptit*, for the notice is in the nature of a plea, and one plea cannot be used as evidence to prove a fact denied in another plea (t); neither can a particular of set-off be used for this purpose, for it is incorporated with the plea (u).

If the set-off exceed the original demand, an action lies for the surplus (x).

A defendant is not, in any case, bound to set off his cross-demand, although the action be brought to recover the balance of an account (y). But if he does not set it off, and makes default at the trial, the plaintiff may, it seems, either take a verdict for the whole sum, subject to a reduction in case the defendant will enter into a rule to bring no action for the set-off, or for the balance, with a special indorsement on the *postea*. And this indorsement will, it seems, be a ground for staying the proceedings, if a cross-action be brought (z).

SETTLEMENT.

Birth and derivative settlements.

- Proof that a party was born in a particular parish is *prima facie* evidence of a settlement there (a). But it has been held, that the declarations of deceased parents are not evidence as to the place of birth (b). And proof that the father, grandfather, or any other male ancestor of the pauper, was settled in the * parish, is *prima facie* evidence of the settlement of the pauper there—the settlement be-

(q) *Knibbs v. Hall*, Peake's C. 210.

(r) *Baskervil v. Brown*, Tr. 1 G. 3. K. B. Sitt. B. N. P. 180.

(s) *Lechmere v. Hawkins*, 2 Esp. C. 626. *Taylor v. Okey*, 13 Ves. 180. *Eland v. Karr*, 1 East, 375.

(t) *Harrington v. Macmorris*, 5 Taunt. 228. [1 Marsh. 33. S. C.]

(u) *Ibid.*

(x) *Hennell v. Fairlamb*, 3 Esp. C. 104.

(y) *Laing v. Chatham*, 1 Camp. 252; 1 Chitty, 178. n.

(z) *Ibid.*

(a) *R. v. Heaton Norris*, 6 T. R. 653. *R. v. Whitley*, 2 Const. 14.

(b) 8 East, 539; B. N. P. 294. [*Supra*, 1115.]

ing transmitted from father to son until a new settlement is gained.

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If the settlement of the father cannot be ascertained, proof of that of the mother will also be *prima facie* evidence of that of the pauper; for if the father had no settlement, a child would take that of his mother (c).

If a derivative settlement be relied on, the relationship must of course be proved in the usual manner (d).

Presumptive evidence of marriage, by proof of cohabitation, reputation, &c. is sufficient (e).

The evidence to prove a hiring and service is either, 1st. Direct; or, 2dly. Indirect. 1st. Where there has been any contract between the parties, whether written or oral, capable of proof, it must be proved; what passed at the time of hiring is the best evidence to prove the nature of the contract; and resort ought not to be had to presumptive evidence, where direct evidence of this nature is attainable. If the terms of the contract be proved, and the effect of that contract be doubtful, the question is a pure question of law (f), which, if it involve real difficulty, may properly be reserved for the consideration of the Court above. If it expressly appear that the hiring was a general one, without any stipulation as to time, the law will infer a yearly hiring, unless something appear to raise a presumption to the * contrary (g). And it has been held by the Court of King's Bench that the circumstance, that the servant quitted before the end of the current year, is not sufficient to rebut the presumption of a yearly hiring from an indefinite hiring (h). Neither will the apprehension and understanding of the pauper, on the subject, make any dif-

Hiring and
service.

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(c) *Cripplegate v. St. Saviours*, 4 Burn, 210, 23d edit. 2 Bott, 13.

(d) See tit. *Pedigree—Bastardy*.

(e) *R. v. Cliviger*, 2 T. R. 263. *R. v. Stockland*, Nolan's P. L. 217. 1st. edit. [*Inhabts. of Newburyport v. Inhabts. of Boothbay*, 9 Mass. Rep. 414.]

(f) If there be any thing in the contract to show that the hiring was intended to be for a year, a reservation of weekly wages cannot control that hiring; but if the payment of weekly wages be the only circumstance from which the duration of the contract is to be collected, it must be taken to be only a weekly hiring. Per Buller, J. *R. v. Newton Toney*, 2 T. R. 453; 2 Bott, 223. *R. v. Odham*, 2 T. R. 622.

(g) *R. v. Wincanton*, Burr. S. C. 299; 4 Burn, 276. 23d edit. *R. v. Berwick St. John*, Burr. S. C. 509; Burn's J. 276. *R. v. Worfield*, 5 T. R. 506. *R. v. Bath Easton*, Burr. S. C. 823. *R. v. Macclesfield*, 3 T. R. 76. But the sessions ought to draw the conclusion, *infra*, 1323. (t)

(h) *R. v. Wenfield*, 5 T. R. 506.

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ference (i). Evidence of conversations and subsequent dealings between the master and servant, on the subject of the contract cotemporary with the service, is admissible, in order to control the presumption (k). But although, as a mere presumption of law, the Court above will infer a yearly from an indefinite hiring, yet, where there are any circumstances in the case which tend to a contrary conclusion, it is the duty of the Court below either to find or to negative the fact of a yearly hiring (l).

Where it is doubtful whether the parties intended a contract of hiring and service, or a contract of apprenticeship, parol evidence, as has been seen, is admissible to show the real intention, although a written contract has been entered into (m).

Fraud.

And in general, evidence of fraud is admissible in opposition to the express and colourable terms of the contract, as to show that the parties really contracted for a year's service, although, in order to * prevent a settlement, they also colourably contracted for a shorter period. But there is no fraud in contracting for a period less than a year, although in order to prevent a settlement (n).

* 1322

Fraud exists in those cases only where the parties actually contract for a year or more, but ostensibly contract for a shorter period, so as to secure the benefit of a contract for a year, or of longer duration, with intent to evade the legal consequences of their act (o). The same observation is applicable where less than the true consideration is expressed in a deed, as the purchase-money to be paid for an estate (p).

Presumptive
evidence.

If direct evidence as to the terms of the actual contract cannot be procured, they may be presumed from the acts and conduct of the parties. Thus, in general, a hiring for a year may be inferred from a service for a year (q), espe-

(i) *Kings Norton v. Camden*, 2 Str. 1139. *R. v. Seaton and Beer*, Cald. 440; 4 Burn, 279. *R. v. Astley*, *ibid.* *R. v. Wincanton*, 4 Burn, 276. Burr. S. C. 299.

(k) *R. v. Dedham*, Burr. S. C. 653. *R. v. St. Matthew, Ipswich*, 3 T. R. 449. Per Buller, J. in *R. v. Seaton & Beer*, 4 Burn, 279.

(l) See *Ld. Kenyon's* observations in the preceding case. If the Court below expressly find a hiring and service for a year, the Court above will be bound by it, although the binding was in fact for a shorter period. *R. v. Tyrley*, 4 B. & A. 624.

(m) *Supra*, 1051, 2.

(n) *R. v. Haughton*, 1 Str. 83.

(o) *R. v. Mursley*, 1 T. R. 694.

(p) *Supra*, 1051.

(q) *R. v. Lyth*, 5 T. R. 327. *R. v. Hales*, 5 T. R. 668. *Saint*

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IV.

Hiring.
Presumptive
evidence.

cially if the presumption be confirmed by the conduct of the parties in relation to that service. And it seems that all acts, and even declarations, made by the parties, contemporary with the service, and connected with it, and explanatory of the terms on which they contracted, would be evidence for this purpose (r); but that mere naked assertions, made subsequently to the service, and unconnected with it, would be inadmissible. The presumption of a yearly hiring from a service for a year, is one of law and fact (s), that is, the court of quarter sessions ought to draw the conclusion from such evidence standing uncontradicted. But if the Court below does not * find a yearly hiring * 1323 from such evidence, the Court above cannot infer one (t). And, in general, where the evidence of a contract is merely presumptive, the Court below must draw the inference, either finding or negating a contract for a year (u).

The Justices below may infer a hiring for a year, from continuance of service, although the original contract was for less than a year (x).

So if there be evidence, tending to prove a dispensation of the service, the Justices below ought to find whether, in fact, there was a dispensation or not, and if they find a dispensation, and there be evidence tending to prove it, the Court above will not interfere (y), although the Court above would have formed a different opinion upon the facts stated.

The fact that the master paid the whole year's wages at the end of the year, is *prima facie* evidence that the party served for the year (z).

To prove a settlement under an apprenticeship, the deed of apprenticeship must, of course, be proved in the usual

Service.

Apprenticeship.

James's in Poole v. Holy Trinity in Wareham, Cald. 141. *R. v. Hampreston*, 5 T. R. 205.

(r) *Wincanton v. Credilon*, N. S. C. 299. *Wandsworth v. Putney*, 2 Bott, 194, *supra*, note (k).

(s) See tit. *Presumption*.

(t) Per Ld. Kenyon, *R. v. Lyth*, 5 T. R. 327. *R. v. Hales*, 5 T. R. 668.

(u) *R. v. Inhabitants of Seacroft*, 2 M. & S. 472. *R. v. Inhabitants of Tyrley*, 4 B. & A. 624. See tit. *Law and Fact*, Part III.

(v) *R. v. Long Wharton*, 5 T. R. 447; where the original agreement was for service from March to Michaelmas, but the service continued for three years. See also *R. v. Hales*, 5 T. R. 668.

(y) *R. v. Inhabitants of Tyrley*, 4 B. & A. 624.

(z) *Milwich v. Creyton*, Burr. S. C. 433.

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IV.Apprentice.
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way (a). But it is sufficient to prove that it was executed by the apprentice, without proving the execution by the master (b) in the case of a parish apprentice, as well as in any other (c). * Where the pauper was bound as a parish apprentice, and the deed was executed by all but the apprentice, who served five months under the indentures, it was held to be a sufficient assent on the part of the apprentice (d).

By the stat. 43 Eliz. c. 2. s. 5, parish apprentices are to be bound by the greater part of the church-wardens and overseers. Where one of the two overseers was also sole churchwarden, and the indentures were executed by the two overseers, the binding was held to be insufficient (e). But by the stat. 51 G. 3. c. 80, such indentures which have been or shall be executed and signed by two persons only, acting or purporting to act in the capacity of church-wardens, as well as of overseers, shall be valid. It was held, under this statute, that where there were three officers in the parish, one of whom acted as churchwarden as well as overseer, a binding by that person, and one of the others who acted as overseer, was sufficient (f).

By the stat. 54 G. 3. c. 107, it is sufficient that such indentures be executed by the overseers of a township, hamlet, or chapelry, and the person or persons acting as church-wardens or chapelwardens for such township, hamlet, or chapelry, provided such person or persons shall have been duly sworn into the office of churchwarden of the parish in which such township, hamlet, or chapelry is contained, or into the office of churchwarden or chapelwarden of such township, hamlet, or chapelry. And by sect. 2, of the same statute, indentures executed by the overseers, and by the churchwardens, &c. or chapelwardens, &c. acting for or appointed in respect of any township, hamlet, chapelry or place, or the major part of them, shall be valid.

(a) *Supra*, Vol. I. p. 328.

(b) *R. v. St. Peters on the Hill*, 14 G. 2; 2 Bott, 367. *R. v. Ribchester*, 2 M. & S. 135. But in general the apprentice, though an infant, must be a party. *R. v. Cromford*, 8 East, 25. *R. v. Chesterfield*, 2 Salk. 479. So, if he be an adult. *R. v. Ripon*, 9 East, 295.

(c) *Ibid.* and *R. v. Fleet*, 17 G. 3; 2 Bott, 371.

(d) *R. v. St. Nicholas in Nottingham*, 2 T. R. 726. It is not essential to proof of an indenture under the statute 8 Ann. c. 9, that oath should be made at the trial as to the amount of the premium actually paid. *Stewart v. Lawton*, 1 Bing, 374.

(e) *R. v. All Saints, Derby*, 13 East, 143.

(f) *R. v. St. Margaret's, Leicester*, 2 B. & A. 200.

* The assent of two Justices under the stat. of Eliz. c. 43, must be proved in writing (*g*); and as this act is a judicial one, a separate signing, without mutual conference, is insufficient (*h*). But it is sufficient that one sign alone, and that after meeting on the subject, the other signs in his presence (*i*).

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IV.

Apprentice.

It is sufficient to prove that the Justices who assented acted as Justices for the county at the time.

Where the respondents, in order to vacate an indenture of apprenticeship, by proof that one overseer only had been appointed, gave notice to the appellants to produce all papers and writings in their custody and power, and the appellants produced one book, which was the only one in existence, and the parish-officer who produced it proved that no appointments were kept by the parish, it was held that the respondents could not inquire of a witness whether, in that year, there had been one or more overseers, without proof that the parish had the actual custody of the appointment; for the overseer himself has the legal custody of his appointment, which he keeps for his own justification; and no notice had been given to him to produce his appointment; recourse could not therefore be had to secondary evidence, before the means of obtaining primary evidence had been exhausted (*k*).

In order to render a service under another person than the original master effectual for the purpose of gaining a settlement, evidence is necessary of an express consent by the master to such service (*l*): the * mere knowledge, on the part of the master, that the apprentice served another, is insufficient (*m*); and so is a general consent to the apprentice to work where he will (*n*).

Proof of assent.

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Where the evidence of assent is circumstantial, it is for the sessions to draw the conclusion (*o*).

In the case of a settlement by serving a public office for

By serving a public office.

(*g*) *R. v. Saltern*, 1 Bott, 613; 4 Burn, 383.

(*h*) *R. v. Hamstall Ridware*, 3 T. R. 380.

(*i*) *R. v. Winwick*, 8 T. R. 454.

(*k*) Per Ld. Ellenborough, *R. v. Stoke Golding*, 1 B. & A. 176.

(*l*) *R. v. Holy Trinity in the Minories*, 3 T. R. 605. *R. v. Crediton*, 1 East, 59. *R. v. Inhabitants of Ashby-de-la-Zouch*, 1 B. & A. 116. *R. v. Shebbear*, 1 East, 73.

(*m*) *R. v. Ideford*, Burr. S. C. 821; 4 Burn, 417.

(*n*) *R. v. St. Luke's, Middlesex*, 1 Bl. Rep. 553; Burr. S. C. 542. *R. v. Inhabitants of Bow*, 4 M. & S. 383. *R. v. St. Helen, Stonegate*, 1 East, 285.

(*o*) *R. v. Crediton*, 1 East, 59. *R. v. Inhabitants of Ashby-de-la-Zouch*, 1 B. & A. 116.

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public office.

a year, if the office be of a public nature, as that of constable, or collector of the land-tax, the law recognizes the existence of the office (*p*). But if the office be of a local nature, its existence must be established according to the circumstances of the case, by means of the original grant, if it still exist, by the court-rolls of a manor (*q*), ancient customaries, (*r*) or entries in the parish books (*s*), &c.

And proof must be given of the election or appointment of the party (*t*). The appointment of a bors-holder must be proved by the presentment of a Jury at the leet (*u*).

The words of the stat. 3 & 4 W. & M. c. 11. s. 6, are, "shall for himself, and on his own account, execute any public office or charge." Those of the stat. 9 & 10 W. 3. c. 11, are, "shall execute some annual office in such parish, *being legally placed in such office*." It seems to have been considered by a writer of great experience and authority on this branch of the law, to * be doubtful whether it be necessary to prove a regular title to the office, as in a proceeding by *quo warranto*; or whether, acting in the office for a year is not *prima facie* evidence of a legal appointment (*x*). It is therefore, at all events, a matter of prudence to be prepared with the proper evidence to show a legal appointment, although, it seems, that evidence of the actual execution of a public office by the party for a year, would afford presumptive evidence of a legal appointment against the inhabitants of the parish where he so acted, for the purpose of a settlement (*y*).

* 1327

By estate.

For evidence of a settlement by estate, the observations which have already been made, as to the proof of a legal title, may be referred to (*z*). Proof of an equitable title is sufficient (1); and this must be proved as in the case of a legal title, by means of the original will, probate, or deed, by virtue of which the right accrues.

It has been said, that in settlement cases the same

(*p*) *Bisham v. Cook*, 2 Const, 167.

(*q*) 4 Leon. 242.

(*r*) *Denn v. Spray*, 1 T. R. 466. *Edwin v. Thomas*, 1 Vern. 489.

(*s*) *Stead v. Heaton*, 4 T. R. 669.

(*t*) *Supra*, tit. *Character—Constable*.

(*u*) *Wingham v. Sellindge*, Burr. S. C. 223.

(*x*) 1 Nolan, 489.

(*y*) See *Berryman v. Wise*, 4 T. R. 366, and *supra*, 372.

(*z*) Tit. *Ejectment*.

(1) [See *Inhabitants of Orleans v. Inhabitants of Chatham*, 2 Pick. 29.]

strictness of proof is not requisite, as in ejectment, where the object is to change the possession and affect the right (a).

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It has been seen, that the sum stated in the deeds of conveyance, as the consideration paid for an estate, is not conclusive in a case of settlement (b).

The evidence to prove a settlement by coming to settle on a tenement of the annual value of 10*l.*, or by *bona fide* taking a lease of such a tenement, with forty days residence (c) in the parish, requires little * notice in the present work. The question whether the tenement be of such a nature as will confer a tenement, seems to be one of mere law (d). It must be proved that the pauper occupied a tenement of the yearly value of 10*l.* during the whole of the forty days residence (e).

By renting a
tenement.

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It is not necessary to prove an express contract for the tenement; it is sufficient if the pauper reside forty days in a tenement of sufficient value with the permission and assent of the landlord, for the law implies a contract (f).

The parties may show that the real annual value of the premises was greater or less than 10*l.*, although a less or greater sum was actually paid (g).

The Court above will not presume that a taking of a tenement was fraudulent, unless fraud be stated, although the case be pregnant with suspicion (h). And therefore, where fraud is objected, the Court below ought to draw the conclusion; and their finding will, it seems, be con-

(a) *R. v. Butterson*, 6 T. R. 554.

(b) *Supra*, 1051.

(c) By the stat. 59 Geo. 3. c. 50, no settlement shall be gained, unless the tenement consist of a house or building, being a separate and distinct dwelling-house or building, or of land within the parish, or of both, *bona fide* hired by such person, at the sum of 10*l.* at least, for the term of one whole year, nor unless the house or building shall be held, and the land occupied, and rent actually paid for the term of one year by the person hiring the same, nor unless the whole of the land be situated in the parish or township wherein the person hiring such land shall dwell.

(d) See *R. v. North Bedburn*, Cald. 452. 2 Nolan, 31, 32. And therefore a case reserved should state the nature of the tenement, to enable the Court above to judge. It was held, to be insufficient to state that the pauper rented a landsale colliery. *Ib.*

(e) *R. v. Bowness*, 4 M. & S. 210.

(f) Per Ashhurst, *J. R. v. Netherseal*, 4 T. R. 258.

(g) *R. v. Bilsdale Kirkham*, 2 Nolan, 28, 29.

(h) Per Ld. Kenyon, *R. v. Fillongley*, 2 T. R. 709.

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removal.

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clusive, if there be evidence tending to the conclusion that the taking was merely colourable and fraudulent (i).

* An order of removal, duly executed, and either confirmed or unappealed from, is an adjudication *in rem*, and therefore final (k); and is conclusive, not only as to the settlement of the parties actually removed, but also as to the facts stated in the order by way of description of those parties. Thus, where *A. B.* and his wife and four children were removed by that description to *F.*, it was held that *F.* was concluded, as to the marriage, and legitimacy of the children, by omitting to appeal against the order, although it turned out that the marriage was totally void (l). And such an order unappealed from is conclusive, not only as to the settlement of the parties removed, but also as to all facts which are necessarily involved in the adjudication. Thus, if a woman be described in the removal-order as the wife of *A. B.*, the order unappealed against will be conclusive, not only as to the settlement of the woman, but also as to the fact of marriage and the settlement of the husband, for they are involved in the judgment of the justices (m).

Again, where two were removed as man and wife, and after removal had children, which were bastards, the man having a former wife living at the time of the second marriage, it was held, that the order unappealed from was conclusive as to the derivative settlement of the children, for that could not be impeached without entering into the merits of the first order (n).

* 1330

* So where a woman was described in the order as *Elizabeth*, the wife of *W. T.*, and the order was unappealed from, it was held that the parties thus acquiescing could not afterwards insist that *Elizabeth* was not the wife of *W. T.*, and that it was conclusive, not only as to her, but also as to the derivative settlement of three children who were born during the cohabitation of the mother with *W. T.* (o).

(i) See *R. v. Tedford*, Burr. S. C. 60. *R. v. Woodland*, 1 T. R. 261. But see *R. v. St. Nicholas, Harwich*, Bur. S. C. 171.

(k) For the general principle, see Vol. I. p. 187-227; and see *Malendine v. Hunsdon*, Foley, 273. *Chalbury v. Chipping Farringdon*, 2 Salk. 488. *R. v. Leverington*, Burr. S. C. 276. 2 Salk. 524. 527. 3 Salk. 261. 1 Str. 232.

(l) *R. v. Northfeatherston*, 1 Sess. C. 154. 4 Burn, 666. *Nymphsfield v. Woodchester*, 2 Str. 1172.

(m) *R. v. Binegar*, 7 East, 377. *R. v. Silchester*, Burr. S. C. 551.

(n) *Nymphsfield v. Woodchester*, 2 Str. 1172. *R. v. Silchester*, Burr. S. C. 551.

(o) *R. v. St. Mary, Lambeth*, 6 T. R. 615.

And such an order is conclusive, although the party removed be misdescribed in the order. Thus, where a woman was removed as *Elizabeth Smith*, widow, it was held that this was conclusive, not only as to her settlement, but even as to that of her husband, *Emanuel Smith*, who was still living (*p*).

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Order of
removal.

So it is conclusive as to all legal consequences. Thus, where a servant during the year's service was removed from his master by an order against which there was no appeal, and in four days after the removal returned to his master, and completed the year's service, it was held that the order was conclusive as to the settlement, the legal effect being to dissolve the contract of service (*q*).

Being a judgment *in rem*, it is conclusive, not only upon the parish to which the removal is made, but against all the world (*r*).

The principle of these decisions is, that the fact to be proved by the order has already been decided by the magistrates. Hence the rule does not apply where the adjudication does not necessarily involve the settlement, or fact in issue. Thus, where the question * was as to the settlement of *Jeremiah Booth*, who was * 1331 proved to have derived a birth-settlement from his father in Halifax, it was held, that an order of removal of the father, *William Booth*, from Halifax to North Owrarn, made and executed after the separation of the son from his father's family, and his marriage, although unappealed against, was not conclusive, or even sufficient to rebut the evidence of the birth-settlement, although it did not appear that *William Booth* had done any thing to gain a settlement. Here it is to be observed, that the settlement of *Jeremiah Booth* was not involved in the adjudication, for the settlement of *William Booth* in North Owrarn was perfectly consistent with the settlement of the son in Halifax; and, according to the general rule, it was not competent to the parties, who relied upon the order, to show what the grounds of the judgment were, and that it was not founded upon any subsequently acquired settlement of the father in North Owrarn, but upon an original settlement there, which would therefore be communicated to the son (*s*).

(*p*) *R. v. Rudgeley*, 8 T. R. 620. *R. v. Silchester*, Burr. S. C. 551. *R. v. St. Mary, Lambeth*, 6 T. R. 615. *R. v. Binegar*, 7 East, 377.

(*q*) *R. v. Kenilworth*, 2 T. R. 598.

(*r*) *R. v. Corsham*, 11 East, 388.

(*s*) *R. v. South Owrarn*, 1 T. R. 353.

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removal.

But an order, though not appealed against, is wholly inoperative where the justices who made it had no jurisdiction (*t*); or where the removal is made to a place which does not maintain its own poor separately, for then there are no parties to make the appeal (*u*); or where the order has been abandoned by the removing parish (*x*).

- If an order of removal from the parish *A*. to the parish *B*. be quashed upon appeal, it is clear that this * will not bind any third parish (*y*). But, in many instances, a discharged order has been held to be conclusive as between the contending parishes, the removing parish failing to prove that any new settlement had been acquired since the former removal (*z*); and it is to be presumed that the former order was discharged upon the merits. Where, however, upon a second removal and appeal, it appeared that the pauper was a certificated man, and that the first removal was before he became chargeable, and the latter after he became so, it was held, that the reversal of the first order was not conclusive even between the same parishes (*a*). and the principle, it seems, is applicable to all removals made subsequently to the stat. 35 Geo. 3. c. 101, which renders a party irremovable till actually chargeable; for the first order may have been discharged for want of proof that the party was chargeable.

Examination
of soldier.

- By the stat. 55 Geo. 3. c. 108, s. 70, two magistrates for the county where any soldier shall be quartered, in case he has either a wife or child, may examine him on oath touching his settlement; and a copy of the affidavit, attested by a magistrate, and delivered to the party making it, is to be admitted in evidence at the sessions with respect to such settlement. The intention of the act was to prevent the inconvenience which might accrue from taking a soldier from his quarters to give evidence, and the copy thus attested is to be lodged in the hands of the commanding officer. If the soldier go abroad, the inconvenience is not likely to * happen, and the statute does not

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(*t*) *R. v. Chilvers Coton*, 8 T. R. 178.

(*u*) *R. v. Swadcliffe*, Cald. 248.

(*x*) *R. v. Inhab. of Diddlebury*, 12 East, 359. *R. v. Llanrhydd*, Burr. S. C. 658.

(*y*) *R. v. Bentley*, Burr. S. C. 425. 4 Burn, 72. *R. v. Cirencester*, Burr. S. C. 17. 4 Burn, 672.

(*z*) *Foston v. Curllon*, 1 Str. 567. *R. v. Bradenham*, Burr. S. C. 394. *R. v. Cirencester*, Burr. S. C. 17. 4 Burn, 672.

(*a*) *R. v. Osgathorpe*, Bur. S. C. 261.

apply (b). Whilst the attested copy is in existence no other copy can be received in evidence (c); but the original itself is evidence, as well as the copy, for it is at least of equal authority, and therefore it would be unreasonable to exclude it (d).

Relief given by a parish to a pauper during his residence in another parish is evidence of a settlement in the former (e); but this merely shows the opinion of the relieving parish at the time, and is by no means conclusive, but is open to explanation, showing that the parish acted under mistake, or ignorance of the facts (f). But it has been held, that relief given to a pauper resident within the relieving parish is no evidence whatever to prove a settlement (g), for overseers are bound to give relief whether the pauper be settled there or elsewhere; and this was so held, not merely where the relief had been confined to a single instance, but even where relief had been several times afforded, and where the pauper had, on two different occasions, been received into the poor-house for a fortnight together, and had been buried at the expense of the parish, and where there was no evidence tending to show a settlement in any other place (h).

As to Competency, *vide supra*, 778,—As to Certificates, *supra*, 362.

(b) Per Lawrence, J. *R. v. Clayton le Moors*, 5 T. R. 708. (In *R. v. Warminster*, 3 B. & A. 122, this dictum of Lawrence, J. was examined and overruled. See *supra*, Vol. II. 547.]

(c) *R. v. Clayton le Moors*, 5 T. R. 706.

(d) *R. v. Warley*, 6 T. R. 534.

(e) *R. v. Wakefield*, 5 East, 335. *R. v. Maidstone*, 2 Nolan, 121. And see *R. v. Inhab. of Dunton*, 15 East, 352.

(f) *Ibid.*

(g) *R. v. Chadderton*, 2 East. 27. 8 East, 498.

(h) *R. v. Chatham*, 8 East, 498. *sed qu.* Lord Ellenborough, in giving judgment in this case, considered the same principle to be applicable as in the case of *R. v. Chadderton*, 2 East, 27; where *Ld. Kenyon* held, that a single instance of relief was not evidence of settlement, inasmuch as overseers were bound to relieve casual poor. But it is difficult to rely upon this reason where the parish gives continued relief for a great length of time; for, although they are bound to relieve casual poor, they are not bound to continue such relief indefinitely. If a parish has maintained an impotent pauper for the space of twenty years, it seems to be going a very great length to say that this is no evidence whatsoever of their liability to maintain him, merely because they might be bound to afford casual relief in the first instance, especially considering that the relieving parish have the means in their own power of explaining the reason why relief was given. Another reason assigned for excluding such evidence, by a general rule, is the impolicy of

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* SHERIFF.

Meane process.
False return.

IN an action against the sheriff for a false return of meane process, the plaintiff must prove,

First. The obligation on the part of the sheriff to arrest or detain.

Secondly. The default of the sheriff, either in neglecting to execute the writ when he might have done so, or his misconduct subsequent to the arrest.

Thirdly. The damages resulting to the plaintiff.

- * 1335 * *First.* It is essential to prove,
 1. The issuing of the process;
 2. The delivery of that process to the sheriff.

Proof of the
writ.

If the process has been returned and filed, an examined copy of the writ and return will prove the issuing and delivery of the writ to the sheriff(i). But if it has not been returned, the sheriff's attorney should be served with notice to produce the writ; and on proof of such notice, and of the delivery of the writ at the sheriff's office, or to his agent, the under-sheriff, and also that search has been made at the Treasury, and that the writ has not been returned, the writ may be proved by secondary evidence(1).

It seems that the sheriff's warrant is evidence against

admitting such evidence. But may it not be fairly inquired, on the other hand, whether it be not impolitic to exclude the truth; and whether it be not impolitic, and even dangerous, to fetter the general rules and principles of evidence with sweeping and peremptory rules, founded upon considerations of policy and convenience, wholly collateral to the investigation of truth? Such a rule is capable of being perverted to the worst of purposes; a parish may support a pauper for an indefinite period, and wilfully suspend the removal until those witnesses who could have proved a settlement are dead.

(i) The indorsement by the sheriff of *non est inventus* on a writ of *ca. sa.* is evidence of the delivery to him. *Blatch v. Archer*, Cowp. 63. *Tildar v. Sutton*, B. N. P. 66. *McNeil v. Perchard*, 1 Esp. C. 263. *Jones v. Wood*, 3 Camp. 229. *Fairlie v. Birch*, 3 Camp. 397.

(1) [See *Parks v. Hall*, 2 Pick. 206, where it is held that when any fact relating to a process is drawn in question, which, according to the forms of proceeding, cannot appear on inspection of the record, it is to be determined by the jury; as whether a writ of attachment, in an action not entered, was ever returned. *S. P. Hinman v. Brees*, 13 Johns. 529.]

himself to prove the issuing the writ, although it would not be evidence for him (*k*).

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A variance in the description of the process, as well in the action for not arresting on mesne process, as in an action for an escape on mesne process, or any other action against a sheriff, founded on his misconduct or negligence in respect of the execution of process, would be fatal: as, if the declaration allege that the plaintiff sued out a *latitat* in a plea of trespass, and the proof be of a *latitat* in trespass with an *ac etiam* (*l*); but if a *ca. sa.* be alleged, it will be supported by proof of an *alias ca. sa.* (*m*).

Writ.
Variance.

Where the declaration alleged that the party was brought before a judge by virtue of a writ of *habeas corpus*, and committed by him to the marshal's custody, * at the suit of the plaintiff, as by the record thereof now remaining in the Court of King's Bench manifestly appears, it was held that the allegation was satisfied by the production of the writ of *habeas corpus*, with the *committitur* indorsed thereon from the office of the clerk of the papers of the King's Bench prison; for where a party on arrest is committed by a judge of the Court of King's Bench at chambers by *habeas corpus*, this writ and the *committitur* thereon are not returned to, or filed, or kept by the court or its officers at Westminster, but are kept by the clerk of the papers of the King's Bench prison, in whose hands they remain as a voucher for the detention of the party; and therefore they are neither of record, nor properly capable of being entered of record, either by themselves, or as part of any other record or proceeding. It was therefore held, that the allegation might either be rejected as surplusage, or at any rate might be considered as satisfied by the production of the writ and return, which were *quasi* of record (*n*).

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But where the declaration alleged that the party was arrested under a writ indorsed for bail by virtue of an affidavit now on record, but no affidavit was produced upon the trial, the Court of Common Pleas held that the plaintiff had properly been nonsuited (*o*).

(*k*) B. N. P. 66.

(*l*) *Gunter v. Cleyton*, 2 Lev. 85; B. N. P. 66.

(*m*) Cro. Jac. 380. B. N. P. 65.

(*n*) *Wigley v. Jones*, 5 East, 440. See the observations of Heath, J. 3 B. & P. 462.

(*o*) *Webb v. Herne*, 1 B. & P. 281. Yet *qu.* whether, according to the doctrine in *Wigley v. Jones*, the "allegation by virtue of an affidavit now on record might not be rejected as surplusage;" it was wholly unnecessary; and it was impossible that this superflu-

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In the case of *Hendray v. Spencer* (p), the declaration, * in an action for permitting a defendant who had been arrested under a *latitat* to escape, alleged a *latitat* against * 1337 *Donner* and *J. Doe*; the writ produced in evidence was against *Donner* and two others, but not against *Donner* and *J. Doe*; but Lord Mansfield overruled the objection.

Writ.
Variance.

Warrant, &c.

Secondly. The sheriff's default or misconduct.—If the cause of action be an omission to arrest, it is essential to show that the sheriff or his agent might have arrested the debtor, had he done his duty. For this purpose, as the default is usually that of the sheriff's agent or bailiff employed to execute the sheriff's warrant issued upon the writ, it is essential to prove that such bailiff was employed by the sheriff or under-sheriff. This fact should be proved by means of the warrant to the bailiff, which is the best evidence for that purpose (r). It is not sufficient to prove him to be a general bailiff to the sheriff, and that he has given a bond of indemnity to the sheriff (s). For this purpose, the bailiff, who usually keeps the warrant, should be served with a *subpoena duces tecum* to produce it.

Where the warrant has not been executed, it is in general returned to the sheriff's office; where it has been executed, the bailiff usually retains it for his own justification, and returns to the office a memorandum of what has been done, from which the sheriff makes his return (t).

Warrant to
the bailiff.

* 1338

If the warrant has been returned to the office, the defendant's attorney should be served with notice to produce it; such a notice, indeed, ought always to be served where there is the least doubt as to the custody * of the warrant. And if the warrant has not been returned, notice to the defendant to produce it is insufficient, without service of a *subpoena duces tecum* on the bailiff (u).

If the bailiff does not produce the warrant, but proves that it has been delivered at the sheriff's office, parol evidence of the contents is admissible. But as the bailiff is usually the real defendant in the cause, having given a

ous allegation could at all mislead. It seems that, at all events, an examined copy of the affidavit would have been sufficient. B. N. P. 114. See tit. *Variance*.

(p) Cited in *R. v. Pippett*, 1 T. R. 238; and see *R. v. Lookup*, cited in the same case.

(r) *Drake v. Sykes*, 7 T. R. 113. *Wilson v. Norman*, 1 Esp. C. 154. *McNeil v. Perchard*, 1 Esp. C. 263. *Lloyd v. Harrie*, Peake's C. 174. [See *Hazard v. Israel*, 1 Binney, 240.]

(s) *Ibid*.

(t) *Martin v. Bell*, 1 Starkie's C. 415.

(u) *Ibid*.

bond of indemnity to the sheriff, it is of course impolitic to make him a witness, if the sheriff's authority to him can be proved by other means.

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The necessity of proving the warrant may be superseded by evidence of an admission on the part of the sheriff, or his under-sheriff, that the bailiff was appointed by the sheriff to execute the writ; but no declaration by the bailiff, that he acted under a warrant from the sheriff, operates by way of admission against the sheriff, even although he has given a general bond of indemnity, for he is not a general agent, but acts under a special authority (x). And even a written paper purporting to be a copy of the warrant, and delivered as such by the bailiff at the time of levying, is not evidence against the sheriff, for it amounts to no more than an admission by the bailiff (y).

Warrant to
the bailiff.

Proof that the name of a bailiff has been indorsed on the writ in the sheriff's office, together with proof that it is the usual course in the sheriff's office to indorse upon the writ the name of the bailiff who is to execute it, is sufficient evidence of authority (z); but the *mere proof of an examined copy of a writ returned and filed, with the name of a bailiff indorsed as employed to execute the writ, is not in itself sufficient to show the agency, without some further evidence to show that the indorsement was made by authority of the sheriff (a) (1). * 1339

But proof of a document produced, on notice given, from the sheriff's office, containing an order to a bailiff to give the necessary instructions for making a return to the writ in question, and containing his answer, is sufficient to show

(x) *Drake v. Sykes*, 7 T. R. 113.

(y) *Ibid.*

(z) *Blatch v. Archer*, Cowp. 63. *Tealby v. Gascoigne*, 2 Starkie's C. 202. *Francis v. Neave*, 3 B. & B. 26. So in an action for extortion, *Bowden v. Waithman*, 5 Moore, 183. *Fermor v. Phillips*, cited *ibid.* *Fonseca v. Magnay*, 6 Taunt. 231; 1 Marsh. 554. In *Fermor v. Phillips*, the writ being produced with the name of B. indorsed upon it, it was held to be a question for the Jury, whether B. acted under the sheriff's authority, the indorsement being *prima facie* evidence of the fact.

(a) *Hill v. Sheriff of Middlesex*, 7 Taunt. 8. *Jones v. Wood*, 3 Camp. 229. *Contra*, *M'Neil v. Perchard*, 1 Esp. C. 263. *Hill v. Leigh*, 1 Holt, 217.

(1) [The return of a person styling himself deputy sheriff, is not evidence against the sheriff, unless it be shown that such person is his deputy, *Slaughter v. Barnes*, 3 Marsh. 413.]

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IV.

Sheriff's default.

that he was the agent of the sheriff in the execution of the writ (b).

Next, the default of the sheriff, either in allowing the debtor to escape after an arrest (c), or by showing that after notice to the sheriff where the debtor was to be found, he neglected to arrest him; or that the debtor was to be met with in the places which he was known to frequent, and might have been arrested; for the sheriff is bound to use all lawful means in his power for the purpose of discovering and arresting the debtor.

Proof of notice to the agent of the under-sheriff in London will not avail as notice to the under-sheriff, inasmuch as his agency is in its nature wholly unconnected with such purposes (d).

- * 1340 * An admission of an escape by the under-sheriff is evidence against the sheriff in an action for an escape (n), or for a false return (o); and declarations made by the bailiff before the return of the writ, when asked by the plaintiff's attorney why he did not execute it, are evidence against the sheriff (e), so are declarations made by the bailiff whilst he has the debtor in custody (f) (1).

Damage. *Thirdly.* The damage resulting to the plaintiff; that is, either that the plaintiff has been delayed in recovering his debt, or that he has lost it, or is likely to lose it. For this purpose, he must prove the original debt as averred in the

(b) *Jones v. Wood & another*, 3 Camp. 228. Note, the action was for a false return to a *f. fa.* that the goods remained in hand for want of buyers, and the answer indorsed on the order was "Goods in hand for want of buyers."

(c) *Blatch v. Archer*, Cowp. 63.

(d) *Gibbon v. Coggon*, 2 Camp. 189.

(n) *Yabsley v. Doble*, 1 Ld. Raym. 190; Peake's C. 65.

(o) *Kempland v. Macauley*, Peake's C. 65.

(e) *North v. Miles*, 1 Camp. 389.

(f) *Bowsher v. Calley*, 1 Camp. 391. n.

(1) [S. P. *Tyler v. Ulmer*, 12 Mass. Rep. 163. *Aza & al. v. Eitlinger*, Anthon's N. P. 74. note, a. *Mott & al. v. Kip*, 10 Johns. 478. *Wheeler & al. v. Hambright*, 9 Serg. & Rawle, 390. The declarations of an under-sheriff are evidence against his principal, not for the reason assigned in *Yabsley v. Doble*, (1 Ld. Raym. 190) that as he has given security for the due performance of the duties of his office, his declarations go to charge himself, he being answerable over, and the real party in interest. But his declarations are evidence to charge the sheriff only where his *acts* might be given in evidence to charge him; and then rather as acts than as declarations; his declarations being considered as part of the *res gesta*. Per Gibson, J. 9 Serg. & Rawle, *ubi sup.*]

declaration (*g*), with the same degree of particularity as, it seems, and no more, than would have been requisite in the original action against the debtor himself (*h*) (2).

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And the plaintiff, it seems, may avail himself of any evidence for this purpose that he could have used against the debtor; even an admission by the debtor as to the existence or amount of the debt made previously to the default, is evidence for this purpose. Thus, where the debtor was sued as the drawer of a bill of exchange, proof of an acknowledgment by him that he had received notice of the dishonour is evidence of the fact (*i*).

Damage.

* The reason of this seems to be, not that there is any * 1341
privity between the original debtor and the sheriff, but because, otherwise, the plaintiff would be placed in a worse situation by the defendant's wrongful act; for if the defendant had done his duty, the acknowledgment of the original debtor would have been evidence of the debt, and the defendant ought not to take advantage of his own wrong in depriving the plaintiff of this evidence. The very loss of the evidence would constitute a damage to support the action. Or the case may be considered in this point of view:—After proof of the defendant's default, the question is as to the damage sustained by the plaintiff; and an acknowledgment by the debtor is evidence to prove that damage, for it shows to what extent the plaintiff might legally have recovered against the original debtor. Such evidence should also be given as the nature and circumstances of the case supply, to show the extent to which the plaintiff has been damnified; as, that subsequent attempts to arrest the debtor have been ineffectual; that he is since dead; or that he has absconded, or become insolvent. If the plaintiff has not, in fact, been injured by the sheriff's laches, the damages will be merely nominal (*k*) (1).

(*g*) *Parker v. Fenn*, 2 Esp. C. 476. n.; 4 T. R. 611.

(*h*) *Alexander v. McCauley*, 4 T. R. 611. *Gunter v. Cleyton*, 2 Lev. 85; B. N. P. 66. Proof of the precise sum is unnecessary, *Ibid*; but if the debt arose on a sale of goods on credit, and it appeared that at the time of arrest the credit was unexpired, the variance would be fatal. *White v. Jones*, 5 Esp. C. 162.

(*i*) *Williams v. Bridges*, 2 Starkie's C. 42, Cor. Abbott, *J. Sloman v. Herne*, 2 Esp. C. 695.

(*k*) *Tempest v. Linley*, Clayton, 34.

(2) [No action can be maintained against a sheriff for an escape on mesne process, unless the plaintiff could have maintained the original action against the prisoner. *Riggs & al. v. Thatcher*, 1 Greenleaf, 68.]

(1) [In an action against a sheriff for an escape and false return

PART
IV.Escape on
mesne process.

In an action for an escape on *mesne process*, if no return has been made, the writ itself may be produced, and proof must be given of the delivery of the writ to the under-sheriff, of the warrant to the bailiff (1), and of an arrest by the latter before the return of the writ (2).

If the action be brought against the marshal of the King's Bench for an escape after a commitment by a judge

(1) *Supra*, 1337.

on mesne process, the plaintiff can recover no more than he might have done in the original action; nor ought he to recover more than he has actually lost in consequence of the escape. *Potter v. Lansing*, 1 Johns. 215. The plaintiff can recover damages only for what he has lost by the escape, and the jury may find such damages as they may think the plaintiff has sustained under all circumstances. *Russell v. Turner*, 7 Johns. 189. *S. P. Governor v. Matlock*, 1 Hawks, 425. *Smith v. Hart*, 2 Bay, 395.

In an action against an officer for a false return upon an original writ, or for any default or neglect of duty, by which the debt appears to be lost, the judgment in the suit against the debtor is *prima facie* evidence of the measure of injury which the plaintiff has sustained: But such evidence may be controuled, and the officer may give in evidence, in mitigation of damages, any facts which show that the creditor has suffered nothing by his default or neglect—as the total inability of the debtor to pay, or fraud and collusion in obtaining the judgment: And in no case ought a party to recover more of the officer, than he has lost by the officer's neglect of duty. *Weld v. Bartlett*, 10 Mass. Rep. 470. *Young v. Horner*, 11 Mass. Rep. 89. *Nye v. Smith*, *ibid.* 188. *Shackford & ur. v. Goodwin*, 13 Mass. Rep. 187. *Rich & al. v. Bell*, 16 Mass. Rep. 299. *Burrell v. Lithgow*, 2 Mass. Rep. 526. *Eaton v. Ogier*, 2 Greenleaf, 46.

In *Paten v. Halsted*, 1 Coxe's Rep. 277, it is said that where an escape is *voluntary*, the jury ought to find for the plaintiff the whole amount of the original debt—and that the judgment against the debtor is *conclusive* against the sheriff as to the amount of the debt.

If an officer returns on a writ that he has taken bail, and afterwards refuses to deliver the bail bond, he is liable in damages to the amount of the creditor's judgment—and cannot show, in mitigation of damages, that the original debtor was poor and unable to pay the debt. Bail could not give such facts in evidence, and the officer, who has deprived the plaintiff of an action against the bail, must be answerable to the same extent that they would. *Simmons v. Bradford*, 15 Mass. Rep. 82. In *Gerrish v. Edson*, 1 N. Hamp. Rep. 82, it was decided that a sheriff, who *knowingly* takes insufficient bail, is liable for the amount of the plaintiff's judgment against the bail, after deducting the probable value of that and of the other judgment recovered against the principal.]

(2) [An action for an escape upon mesne process does not lie in North Carolina; *Sweepson v. Whitaker*, 1 Hayw. 224—unless the sheriff return an escape. *Tuton v. Sheriff*, 1 Hayw. 485. See *Governor v. Jones*, 1 Hawks, 359. Under the statutes of Tennessee, the remedy for an escape on mesne process is by *scire facias*. *M'Kee v. Love*, 2 Overton's Rep. 243.]

upon an *habeas corpus*, the *habeas corpus*, with the *committitur* annexed, should also be proved; and as this * remains in the custody of the marshal, notice should be given to produce it (*l*).

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IV.

* 1342
Escape.

It must also be shown, that after the arrest, &c. the defendant suffered him to escape, and that he was at large, or in improper custody, after the return of the writ (*m*), and that bail above has not been put in. Proof by the defendant that bail has been put in, and perfected in a term subsequent to the return of the writ, will not afford any defence to an action which has been previously commenced (*n*). But if the defendant in the original action has put in and perfected bail, or having put in bail, has rendered himself in their discharge before the time for bringing in the body has expired, the action will not be maintainable, although no bail-bond has been taken (*o*).

If the sheriff has returned *cepi corpus*, proof of the writ and return will prove the arrest (*p*).

The production of the writ by the plaintiff, in order to show the obligation on the sheriff to arrest and detain the debtor, does not entitle the sheriff to have his return, which is indorsed upon the writ, read in evidence as part of the document (*q*).

* The admission of the under-sheriff of an escape is evidence against the sheriff (*r*). * 1343

Lastly. The plaintiff must prove his debt, and the damage which he has sustained from the sheriff's negligence (*s*).

If the plaintiff allege that he has a good cause of action

(*l*) *Wigley v. Jones*, 5 East, 440. See *Watson v. Sutton*, 1 Salk. 272. See also the st. 8 and 9 W. III. c. 27, s. 9; *infra*, 1346.

(*m*) In the case of mesne process, the sheriff is to take the body of the debtor, and have him ready to produce on a certain day; it is therefore sufficient if he bring in the body on that day. But in the case of an arrest in execution, if the party be at large for the shortest space of time, whether before or after the return, it will be an escape. *Hawkins v. Ploner*, 2 Bl. Rep. 1048. *Atkinson v. Mattoon*, 2 T. R. 172.

(*n*) *Moses v. Norris*, 4 M. & S. 397.

(*o*) *Pariente v. Plumtree*, 2 B. & P. 35.

(*p*) *Fairlie v. Birch*, 3 Camp. 397.

(*q*) *Ailey v. Bridges*, 2 Starkie's C. 189, Cor. Holroyd, J. But the return, which was, that the party had been rescued, was afterwards admitted to be read as part of the defendant's evidence. *Qu.*

(*r*) *Yabsley v. Doble*, 1 Ld. Raym. 190. *Kempland v. Macauley*, Peake's C. 65; *supra*, 1340. [and note (1).]

(*s*) *Supra*, 1340.

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against the party suffered to escape, he must prove a cause of action, or he will be liable to be nonsuited (t).

Escape.

Where a sheriff's officer kept the defendant in his custody after the return of the writ, and then took him to prison, it was held, that as the plaintiff had sustained no damage, the action was not maintainable (u).

Defence.

The sheriff may show in defence, that the defendant in the original action did, in fact, put in and perfect bail, or that he put in bail and rendered himself in their discharge before the time for bringing in the body had expired, although no bail-bond was taken (x). But the putting in of bail after the expiration of the term in which the writ is returnable will be no defence to an action previously commenced (y).

The sheriff may also show that the debtor was rescued in going to gaol; but after he has once been within the walls of the prison, a rescue by any but the king's enemies will be no excuse (z).

- * 1344 * It is no defence to show that the plaintiff knew of the escape, yet proceeded in his action to judgment, but had not charged the debtor, who returned to gaol in execution (a), for it is no waiver.

If the bailiff of a liberty arrest on the sheriff's mandate, and suffer an escape, the bailiff, and not the sheriff, is responsible (b).

False return
to a *f. fa.*

In an action for a false return to a writ of *fi. facias*, the plaintiff must prove, 1st. The judgment, the writ of *fi. facias*, and return (c): 2dly. The warrant to the bailiff (d); and that the defendant had goods within the county; that the bailiff had express notice of such goods, where that was the fact; or that he might have levied had he used

(t) 2 Lev. 85; B. N. P. 66. But a variance as to the amount will not be material. *Ibid.*

(u) *Planck v. Anderson*, 5 T. R. 37. [See also *Cady v. Huntington*, 1 N. Hamp. Rep. 138.]

(x) *Pariente v. Plumtree*, 2 B. & P. 35. But if the defendant has been permitted to go at large without a bail-bond, the Court will not stay the proceedings upon the defendant's putting in bail. *Webb v. Matheo*, 1 B. & P. 225. *Fuller v. Prest*, 7 T. R. 109.

(y) *Moses v. Norris*, 4 M. & S. 397.

(z) B. N. P. 68.

(a) *Ravenscroft v. Eyles*, 6 Geo. III. C. B. B. N. P. 69. [See *Jackson v. Bartlett*, 8 Johns. 361.]

(b) *Noy*, 27; B. N. P. 69; 3 Wils. 309.

(c) *Supra*, Vol. I. 245. 285.

(d) *Supra*, 1337.

due diligence ; or that he actually did seize goods of the defendant (1).

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In the latter case, where the goods having been claimed by a third person, and the sheriff, on receiving an indemnity returned *nulla bona*, the plaintiff should be prepared with such evidence as the case affords to prove that the goods were really the property of the debtor, as by proof of his possession of and dealing with the property as his own ; and particularly with such evidence as shows that the transfer to the claimant was either merely colourable in order to defeat the execution, or that it is void as against a judgment-creditor under the statute 13 Eliz. c. 5 (e).

Title to the
property.

In such case, it may be advisable to give notice to the sheriff's attorney to produce the bond or agreement to indemnify the sheriff ; and if it be made to appear, either by the instrument itself, or by the sheriff, or his agent's admission, that the sheriff is indemnified * by another, any declaration on the subject by the latter will be evidence for the plaintiff. * 1345

An allegation in a declaration for a false return of *nulla bona* to a *fiery facias* against the goods of *A.* and *B.*, that "although *A.* and *B.* had goods, &c. within the bailiwick," is supported by proof that either of them had goods, for the averment is severable (f).

If the defence be, that before the sale under the plaintiff's writ the former defendant was declared a bankrupt, having committed an act of bankruptcy previous to the execution of the writ by the sheriff (g), the latter will be bound to prove all the facts necessary to support the commission (h). Defence.

To an action for a false return of *nulla bona*, the sheriff may show that the plaintiff lost his legal priority of execu-

(e) *Supra*, 615. [See *Shannon & al. v. Commonwealth*, 8 Serg. & Rawls, 444. *Meeker & al. v. Wilson*, 1 Gallison, 419.]

(f) *Jones v. Clayton*, 4 M. & S. 349.

(g) So although the act of bankruptcy becomes complete after the levy, as by lying in prison for two months ; but when completed, has relation to a day prior to the delivery. *Cooper v. Chitty*, 1 Burr. 20. *Coppingdale v. Brigden*, B. N. P. 41.

(h) *Ibid. supra*, 140. 171.

(1) [In an action against the sheriff for selling real property on an execution, when personal property might have been had, it lies on the plaintiff to show that he had personal property known to the sheriff, and accessible to him. *Swingle v. Boyer*. 1 Overton's Rep. 226.]

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tion by directing him not to levy till a future day, and that in the mean time another writ was delivered to him (i).

A verdict found on an inquisition by the sheriff to ascertain the property, is not evidence for the sheriff, even in mitigation of damages (k) (1).

Escape.
Execution.
* 1346

The plaintiff in an action (l) for an escape of one in * execution must first prove that the party was once in lawful custody. If the sheriff has returned *cepi corpus*, the

(i) *Bradley v. Wyndham*, 1 Wils. 44. *Kempland v. Macaulay*, Peake's C. 65. *Smallcomb v. Buckingham*, 1 Ld. Raym. 251; 1 Salk. 320.

(k) *Glossop v. Pole*, 3 M. & S. 175.

(l) Debt lies for an escape in execution, upon an equitable construction of the stat. West. 2. and 1 R. II. c. 12—(2). But if a plaintiff have execution of lands, goods and body, and the prisoner escape, because the lands remain in execution, debt will not lie, but only an action on the case. Cro. Jac. 657; B. N. P. 68. It lies at the suit of a hundred, after the plaintiff has been taken on a *ca. sa.* for costs, and escaped. B. N. P. 68; Fitzg. 296.

(1) [In *Bayley v. Bates*, 8 Johns. 185, it was held that an inquisition made by a sheriff's jury to ascertain whether the property in goods, taken on a *feri facias*, is in the defendant or not, if found not to be in him, is a justification to the sheriff for returning *nulla bona*, and a conclusive defence in an action against him for a false return; unless it be shown that he did not act with good faith. It was said by the court in this case, that there was not any express adjudication upon the point. But in *Townsend v. Phillips*, 10 Johns. 98, where goods, taken on an execution against A. were claimed by B. and the officer summoned a jury of inquisition as to the claim; it was held that the inquisition was no justification in an action of trespass by B. against the officer, but went in mitigation of damages only. A distinction was taken, in this case, between an action against the officer for a false return of *nulla bona*, and an action for seizing goods not belonging to the party against whom he was to proceed.]

(2) [These statutes are in force in Pennsylvania, Rhode-Island, New-Hampshire, New-York, and Massachusetts. *Shewell v. Fell*, 3 Yeates, 17. S. C. 4 Yeates, 47—*Steele v. Field*, 2 Mason's Rep. 486—*Gerrish v. Edson*, 1 N. Hamp. Rep. 85—*Rawson v. Dole*, 2 Johns. 454—*Porter v. Sayward*, 7 Mass. Rep. 377.

Notwithstanding what is argued by counsel in *Platt's case*, (Plowd. 35.) to the contrary, there does not seem any reason to suppose that debt was a remedy for an escape, at the common law; for according to all analogies of that law, it lay not in cases of tort, but of contract only, where the claim was for a sum certain; and it seems impossible to conceive that the injury to the plaintiff, in cases of escape, could always be a sum certain. From the nature of the case, it is a tort, and sounding in damages, and perpetually varying in measure and extent. The statutes of West. and 2. Rich. H. were, in my judgment, introductive of new law. Per Story, J. 2 Mason's Rep. 513. See also remarks of Buller, J. 2 T. R. 129.]

plaintiff should prove an examined copy of the judgment, writ and return ; but if the writ has not been returned, it may be produced, and the plaintiff must then proceed to prove an arrest by the sheriff, by proof of the warrant to the bailiff, and of an arrest of the party by the bailiff. If the action be brought against the marshal of the King's Bench, or the warden of the Fleet, upon a commitment in execution, such commitment, which is the act of the Court, should be proved by an examined copy of the *committitur* entered of record (m).

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IV.

Escape.
Execution.
Arrest.

Where a prisoner renders himself in discharge of his bail, and the plaintiff's attorney accepts him in execution, the render is entered in the judge's book, and a *committitur* is filed, and if the prisoner escape, the marshal is not chargeable without notice, either by serving him with a rule, or entering a *committitur* also in his book, without proving the party actually in prison (n).

If a debtor be in custody of the sheriff at the suit of one creditor, and a second creditor deliver a *ca. sa.* to the sheriff on his own suit, the delivery of the writ is an arrest in law (o).

The stat. 8 and 9 Will. III. c. 27, s. 9, directs, that if any person desiring to charge another with any action or execution, shall desire to be informed by the marshal of the K. B., or warden of the C. P., or his deputy, by any other keeper or keepers of any other prison, whether such a person be a prisoner * in his custody or not, every such * 1347 marshal, warden, or keeper, shall give a true note in writing thereof to the person requesting the same, or his attorney, on demand ; and if such marshal, warden, keeper, or deputy, shall give a note in writing that such person is an actual prisoner in his custody, such note shall be taken as evidence of the fact (p).

In practice, when a prisoner in custody of the marshal is to be charged with a King's Bench execution, a rule is obtained for the marshal to acknowledge the defendant to be in his custody. Such an acknowledgment is of course evidence to prove the fact. Where a prisoner is in custody of the warden of the Fleet, and is charged with a Common Pleas or Exchequer writ, a *habeas corpus* is obtained,

(m) *Turner v. Eyles*, 3 B. & P. 456. *Wigley v. Jones*, 5 East, 440. See *Barnes v. Eyles*, 2 Moore, 561 ; where it was held that a commitment in execution must be alleged to be of record.

(n) B. N. P. 67, 8 ; 1 Salk. 272.

(o) 1 Salk. 274 ; B. N. P. 66.

(p) See B. N. P. 68.

PART
IV.Escape.
Execution.

the return to which proves the fact of his being in custody (q).

The plaintiff must then prove that the debtor was at large after the arrest, either before or after the return of the writ. The permitting the debtor to be out of the defendant's custody for any purpose, for the shortest space of time, will amount to an escape: as, where the bailiff of a liberty, after arresting the debtor, delivers him into the county gaol (r); or the debtor is allowed to go out to settle his affairs, in the custody of a bailiff (s) (J).

By the stat. 8 and 9 Will. III. c. 48, "If the marshal or warden, or their deputies, or the keeper of any prison, after one day's notice in writing given for the purpose, shall refuse to show a prisoner committed in execution to the creditor, or his attorney, such refusal shall be adjudged to be an escape."

- * 1348 * If a sheriff on going out of office omit to deliver over a prisoner charged with his execution to his successor, it is an escape; and if a sheriff die, the new sheriff must at his peril take notice of all prisoners in his custody, and the executions with which they are charged (t) (2).

(q) Peake's Ev. 422, 5th edit.

(r) *Benton v. Sutton*, 1 B. & P. 24.

(s) *Boothman v. The Earl of Surry*, 2 T. R. 5. [See *Wool v. Turner*, 10 Johns. 420.]

(t) 3 Co. 71. B. N. P. 68. By the stat. 3 Geo. I. the under-sheriff is answerable till a new sheriff be appointed. An assignment by an under-sheriff to the succeeding sheriff, although not by indenture, is a good assignment (B. N. P. 69. 1 Barnes, 259). If a man in execution escape, and return again, and afterwards be made over with other prisoners, and again escape, the second sheriff will be chargeable. B. N. P. 69. 2 Lev. 109. [See *Rawson v. Turner*, 4 Johns. 469. *Dash v. Van Kleeck*, 7 Johns. 477. *Hempstead v. Weed*, 20 Johns. 64.]

(1) [It is an escape to make a prisoner for debt a turnkey, and to entrust him with the keys of the outer and inner doors, at all times, by night and day. *Steere v. Field*, 2 Mason's Rep. 486. If the jailor be committed to his own jail, and no new keeper is appointed, it is an escape of the jailor, for which the sheriff is responsible, but it is not an escape of the other prisoners, if they are in fact kept in custody under the jailor's authority or his agents. *ibid.* See also *Gage v. Graffam*, 11 Mass. Rep. 184. *Colby v. Sampson*, 5 Mass. Rep. 310. *Day & al. v. Brett*, 6 Johns. 22. *acc.*]

(2) [Where an indenture of assignment of prisoners, from the old to the new sheriff, specified a suit by the title of A. B. & Co. vs. C.; this was held sufficiently certain, without giving the names of the plaintiffs at large: It was a sufficient notice to the new sheriff of the execution against the prisoner. *Tallmadge v. Richmond*, 9 Johns. 85.]

If the plaintiff allege that the sheriff took *A. B.* and his wife in execution (on a judgment against both for a debt due from the wife *dum sola*), and that he permitted both to escape, and proves only that he took the husband, and permitted him to escape, the variance is not fatal (*u*).

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IV.

Escape.
Execution.
Variance.

The plaintiff is entitled to recover the whole debt; and therefore, in an action of debt, evidence as to the situation and circumstances of the debtor is immaterial (*x*) (*2*).

If the debtor has not been taken on a fresh pursuit, the defendant cannot avail himself of any excuse, by way of defence, short of showing that the escape was occasioned by the act of God, or the king's enemies (*y*). A rescue from the defendant's officers whilst they were conveying the debtor under a *habeas corpus* (*z*), * or the destruction of the prison by a mob (*a*), afford no * 1349 defence.

Defence.

The defendant cannot defend himself by proof that the debtor escaped against his will, and that he made fresh pursuit, and retook him before the commencement of the action, without a special plea, supported by affidavit (*b*). The defendant may also, under a special plea, prove that the debtor returned into his custody before the commencement of the action (*1*), but he must show that the debtor

Fresh pursuit.

(*u*) 1 Sid. 5. B. N. P. 65. If both baron and feme be taken in execution, and the feme be suffered to escape, an action lies, although the baron continue in prison. 1 Roll. Ab. 810. B. N. P. 65.

(*x*) 2 T. R. 126. 2 Bl. Rep. 1048.

(*y*) 1 Roll. Ab. 808. 4 Co. 84. B. N. P. 66. As from the prison taking fire, or being broken open by the king's enemies.

(*z*) *O'Neil v. Marson*, 5 Burr. 2812. *Fitz Jefferies'* case, 1 Sid. 13. 3 Co. 44. B. N. P. 67. 3 Keb. 51. 305. 1 Stra. 431.

(*a*) *Alsept v. Eyles*, 2 H. B. 108. .

(*b*) By the stat. 8 & 9 Will. III. c. 27. This plea may be pleaded to an action charging a voluntary escape (*Bonafous v. Walker*, 2 T. R. 126); and the plaintiff may reply a voluntary escape. 1 Vent. 211. B. N. P. 67.

(2) [In an action on the case against an officer for an escape on execution, or for a false return, &c. upon an execution, the jury may give more or less than the plaintiff's original judgment—according to the actual damage which has been caused by the officer's default. *Colby v. Sampson*, 5 Mass. Rep. 310. *Selfridge v. Lithgow*, 2 Mass. Rep. 374. *Rawson v. Dole*, 2 Johns. 454. *Van Slyck v. Hogeboom*, 6 Johns. 270. *Taylor v. Commonwealth*, 3 Bibb, 356. See *Ackley v. Chester*, 5 Day, 221. *Wolverton & al. v. Commonwealth*, 7 Serg. & Rawle, 273.]

(1) [See *Dole v. Moulton*, 2 Johns. Cas. 205. *Lansing v. Fleet*, ibid. 3. A voluntary return before a suit is brought is not a defence in an action for an escape, whether negligent or voluntary,

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remained in custody till the commencement of the action. Where the replication traversed the keeping and detaining *modo et forma*, and the plaintiff proved that the debtor again escaped, and died out of custody, it was held that he was entitled to a verdict (c).

- * 1350 A sheriff or other officer cannot take advantage of an error in the process (d); but he may show that the judgment was actually void as *coram non judice* (e); as, where the action is for an escape after the execution of a *ca. sa.* on a judgment given in an inferior Court on a bond which was made beyond the limits of the jurisdiction (f). But the sheriff is liable, although the * *ca. sa.* issued after a year from the judgment without a *scire facias*, for this process, though erroneous, is not void (g).

Money had
and received.

Where a sheriff seizes goods in execution after an act of bankruptcy committed by the judgment-debtor, on which a commission afterwards issues, and he sells part of the goods on the day on which the commission issues, and part the next day, he is liable in an action by the assignees for money had and received to their use, unless he can show that he paid over the money to the execution-creditor before he had notice of the commission (h).

Where the sheriff has returned to a writ of *feri facias*, that he has levied the money, debt lies to recover it (i); and the sheriff's return upon the writ proves the receipt of the amount to the use of the plaintiff (1).

(c) *Chambers v. Jones*, 11 East. 406.

(d) B. N. P. 65. [*Bissel v. Kip*, 5 Johns. 89. *Hutchins v. Edson*, 1 N. Hamp. Rep. 139. Yelv. 42, a, note (1), and cases there collected.] But where an action was brought against the marshal of the K. B. for not receiving a copy of the declaration against a prisoner *per quod* the plaintiff lost his suit; and it appeared that the declaration was tendered at the prison before the bill was filed, the plaintiff was nonsuited. *Ekins v. Ashton*, Midd. 1752, per Lee, C. J. B. N. P. 65.

(e) Carth. 148. B. N. P. 65, 66. [*Albee v. Ward*, 8 Mass. Rep. 79.]

(f) B. N. P. 65. Where the Court has cognizance of the cause, the judgment is only erroneous; but if the Court has no jurisdiction, it is void. B. N. P. 66.

(g) *Bushe's case*, Cro. Eliz. 188. B. N. P. 66. And the sheriff may justify in an action of false imprisonment.

(h) *Lee v. Lopes*, 15 East, 230.

(i) Hob. 206.

on mesne process, after the return of the writ. *Stone v. Woods*, 5 Johns. 182. See also *Richmond v. Tallmadge*, 16 Johns. 308. *Drake v. Chester*, 2 Conn. Rep. 473.]

(1) [A demand must be made of money collected by an officer

In an action on the case against a sheriff, who has returned to a writ of *venditioni exponas* that he has sold part, and that the residue remains in his hands for want of buyers, and where the declaration alleges that he had not the money levied at the return of the writ before the king, &c. but that, contrary to his duty, he had paid the sum levied, and delivered the goods to divers persons unknown, the sheriff may show that the goods were in fact the property of the assignees of the defendant, who had become bankrupt (k).

In an action for taking insufficient pledges on a *replevin-bond (l), the plaintiff (m) must prove the sum due for rent, the taking of the distress, the replevin, the bond, the judgment in the replevin-suit, &c. as alleged, and the insufficiency of one or both the sureties. The replevin must be proved by the warrant or precept of the sheriff or his deputy (n). The bond is usually proved by means of the attesting witness, notice having been given to the defendant to produce it; but it seems that where the sheriff, or his officer, has taken a replevin-bond according to the statute, which is produced upon the trial, proof of its execution by means of the attesting witness is not essential (o).

* 1351
Case for taking insufficient pledges.

It seems that slight evidence of the insufficiency of the sureties is sufficient to throw the burthen on the sheriff, for they are known to him, and it is his duty to take care

(k) *Brydges v. Walford*, 1 Starkie's C. 380, in the note. *Semble*, an action does not lie against the sheriff, who has not been ruled to return the writ, for not having the money in court according to the exigency of the writ. *Moreland v. Leigh & another*, 1 Starkie's C. 380. See 2 Inst. 452. Com. Dig. Return, F. 1.

(l) The stat. 11 Geo. II. c. 23, enacts, "that all sheriffs, and other officers having authority to grant replevins, shall in any replevin of a distress for rent take from the plaintiff and two responsible persons, as sureties, in their own names, a bond in double the value of the goods distrained, conditioned for prosecuting the suit with effect and without delay, and for duly returning the goods and chattels distrained, in case a return shall be awarded."

(m) A bailiff who makes cognizance may maintain the action. *Page v. Eamer*, 1 B. & P. 378.

(n) The bailiff should be served with a *subpoena duces tecum*, to produce the precept, and notice should be given to the defendant's attorney to produce it at the trial.

(o) Per Abbott, C. J. in *Scott v. Waithman*, Westm. Sitt. after Mich. Term, 3 Geo. IV.

upon an execution, before an action will lie against him for it. *Church v. Clark*, 1 Root, 333. See also *Davis v. Armstrong*, 1 Marsh. (Ken.) Rep. 364.]

PART
IV.Insufficient
sureties.

* 1352

that they are sufficient (*p*). But if the sureties were apparently responsible persons the sheriff is not liable, although they are not actually so, and although he neglected to inquire into their actual responsibility (*q*); and therefore it is essential to prove either that the sheriff or his agent actually knew that they were insufficient, or that the badness * of their credit or insolvency was notorious in the neighbourhood of their residence, so that the sheriff or his deputy might have ascertained the fact if they would (*r*).

Doubts have been entertained as to the extent of the sheriff's liability (*s*); but it seems, that if in the replevin suit the present plaintiff has had judgment merely for the return of the goods, he cannot recover more than double their value.

By sheriff
against a
surety.

A sheriff having taken one surety only in a replevin-bond may sue him (*t*); but in an action against him for not having returned the goods, the declaration suggesting breaches according to the stat. 8 & 9 Will. III. the defendant is liable to a moiety only of the damages recovered against the sheriff. He is not liable to the costs incurred by the sheriff in defending an action against him for taking insufficient pledges (*u*).

Action by a
landlord.

* 1353

In an action against the sheriff by a landlord for not paying rent due in respect of the premises on which goods are taken in execution (*x*), the plaintiff must * prove,

(*p*) B. N. P. 60. *Saunders v. Darling*, Sitt. at Westm. C. B. Trin. 10 Geo. III.

(*q*) *Hindle v. Blades*, 5 Taunt. 225. [1 Marsh. 27. S. C.]

(*r*) Per Abbott, C. J. in *Scott v. Waithman*, Westm. Sitt. after Mich. Term. 3 Geo. IV.

(*s*) See *Yea v. Lethbridge*, 4 T. R. 433. *Evans v. Brander*, 2 H. B. 547; where damages were limited to double the value of the goods distrained. In a later case (Peake's L. Ev. 425, 5th edit.); the Court of C. P. is stated to have held, that the defendant was liable to the full extent of the penalty of the bond. In *Concanon v. Lethbridge*, (2 H. B. 36), it was held, that the defendant was liable beyond the penalty of the bond. This case, however, seems to have been deliberately overruled in the subsequent case of *Evans v. Brander*, 2 H. B. 547. In *Hefford v. Alger*, (1 Taunt. 218), it was held, that the two sureties were together liable only to the amount of the penalty of the bond, and the costs of the suit on the bond.

(*t*) *Austen v. Howard*, 1 Moore, 68; 2 Marsh. 352; 7 Taunt. 28. 327.

(*u*) *Austen v. Howard*, 1 Moore, 68. Sureties in a replevin bond are not discharged by giving time to the principal. *Moore v. Bowmaker*, 6 Taunt. 379. 2 Marsh. 81.

(*x*) Under the stat. 8 Ann. c. 14, s. 1, which enacts, that no goods or chattels upon any messuage, lands or tenements, leased for life, term of years, at will, or otherwise, shall be liable to be taken by

1, The demise to the tenant, and that the rent is due, as stated in the declaration; 2, The levy by the sheriff; 3, Notice of the sum in arrear to the sheriff or his deputy (y); 4, The value of the goods seized.

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IV.

After proving the demise, and occupation by the tenant, it is not necessary to prove the state of accounts between the plaintiff and his tenant; it lies on the defendant to prove that the rent has been paid (x). It is sufficient to prove the rent due by virtue of an agreement to pay rent in advance (a). Rent due.

The plaintiff will not be entitled to recover in respect of any rent which has accrued after the seizure (b), although the sheriff still remained in possession (c).

In an action against the sheriff for having wrongfully paid a year's rent to the landlord of the premises on which the debtor's goods were seized under a *fi. fa.*, * it is incumbent on the sheriff to give *some* evidence to show that the sum was due (v); and it seems that the landlord would

* 1354

virtue of an execution*, on any pretence whatsoever, unless the party at whose suit the said execution is sued out shall, before the removal of such goods from off the said premises, by virtue of such execution or extent, pay to the landlord, or his bailiff, all such sums of money as are due for rent for the said premises at the time of such taking of the goods, provided the arrears of rent do not amount to more than one year's rent. [See *Governor v. Edwards*, 4 Bibb, 219.]

It is no defence that the sheriff afterwards returned the goods to the premises, for they could not be distrained on after being taken in execution. *Lane v. Crockett*, 7 Price, 566.

The statute contemplates an existing tenancy, and does not apply, where by a judgment in ejectment the tenant is a trespasser from a day previous to the seizure under the *fi. fa.* *Hodgson v. Gascoigne*, 5 B. & A. 88.

(y) 1 Str. 97; Tidd, 1033.

(z) *Harrison v. Barry*, 7 Price, 690.

(a) Ibid. And such rent may be distrained for by a landlord who anticipates an execution by a judgment-creditor.

(b) 1 M. & S. 245.

(c) *Hoskins v. Knight*, 1 M. & S. 245. Even although growing corn was the subject of seizure, which must necessarily remain on the premises to ripen. *Gwilliam v. Barker*, 1 Price, 174.

(v) *Keighley v. Birch & another*, 3 Camp. 521.

* These words include an execution for costs of a nonsuit (*Henchell v. Kington*, 2 Wils. 140); an outlawry in a civil suit (*St. John's College v. Murcott*, 7 T. R. 259); a seizure under a commission of bankrupt, (*Buckley v. Taylor*, 2 T. R. 600). But yet if the sheriff seize goods under an execution which is afterwards overhauled by a commission of bankrupt, the sheriff, as against the assignees, will not be allowed to deduct a year's rent as due to the landlord, unless he has actually paid it over before notice of the commission. *Lee v. Lopes*, 15 East, 230.

An extent in aid is not within the stat. *R. v. De Caur*. 2 Price, 17.

PART
IV.

not be a competent witness for this purpose; for if the plaintiff succeeded, the witness would be liable to the sheriff, and the judgment would be evidence to prove special damage.

Trespass.

In an action of trespass against the sheriff for seizing the plaintiff's goods under a *fiery facias*, proof of the warrant is sufficient to connect the sheriff with the acts of the bailiff under the general issue; and this evidence will be no proof of the writ to the sheriff, but he must prove it in support of his plea of justification (*d*). A bill of sale executed by the sheriff, reciting the writ and seizure, is evidence of the taking (*e*).

Proof that the bailiff, under the sheriff's warrant, upon an execution against the goods of *A.*, seized those of *B.*, is evidence to support an action of trespass against the sheriff, who is liable *civiliter* for the acts of his bailiff (*f*).

The sheriff cannot justify the arresting of the real defendant, or taking his goods, where his name is mistaken in the writ (*g*).

Trespass.
Sheriff.*

* 1355

Where the defence is, that the goods were fraudulently assigned to the plaintiff by a debtor against whom the *process issued, in order to defeat the execution of his creditor, the assignment is void against that creditor; but in such case, in order to defeat the assignment, it is necessary to prove the judgment as well as the writ (*h*). But if the assignment or delivery of possession were merely colourable, and the property still remained in the debtor against whose goods the execution issued, the sheriff would, it seems, be entitled to a verdict without proof of

(*d*) *Grey v. Smith*, 1 Camp. 387.

(*e*) *Woodward v. Larking*, 3 Esp. C. 286.

(*f*) *Saunderson v. Baker*, 3 Wils. 309; and the cases there cited. And see *Woodgate v. Knatchbull*, 2 T. R. 148; *Ackworth v. Kempe*, Doug. 40.

(*g*) *Shadgett v. Clipson*, 8 East, 328. *Cole v. Hindson*, 6 T. R. 234. *Scandover v. Warne*, 2 Camp. 270. Where a defendant has been arrested by a wrong christian name, and the sheriff returns, "I have taken *A. B.* sued by the name of *C. B.*" he is a trespasser. *R. v. Sheriff of Surry*, 1 Marsh 75. But if a party being asked his real name previous to the issuing of process, admit it to be *John*, he cannot afterwards insist that his name is *William*. *Price v. Harwood*, 3 Camp. 108. [See *Morgans v. Bridges & al.* 1 B. & A. 647.]

(*h*) *Lake v. Billers*, 1 Ld. Raym. 733. *Martyn v. Podger*, 5 Burr. 2631. [*Damon v. Bryant*, 2 Pick. 411.]

* For the proofs in an action by the assignees of a bankrupt against the sheriff, *vide supra*, 170, 171. 178.

the judgment, the plaintiff having no property in the goods (i).

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The judgment-debtor is not a competent witness to prove that he did not assign the goods to the plaintiff, which have been taken in execution by the sheriff; for the effect of his testimony would be to pay his own debt at the plaintiff's expense (k). Competency.

In an action against a sheriff for extortion committed by his bailiff (l), the plaintiff must prove the * issuing of the writ (m), the warrant (n), and the extortion committed by the bailiff; but where it appears from the return to the writ itself, that more has been taken for executing the writ than the sheriff was entitled to, proof of the warrant is unnecessary (o). Extortion.
* 1356

In an action under the stat. 32 Geo. II. c. 28, to recover the penalty of 50*l.* for taking more than is by law allowed for waiting till bail is given, it has been held, that it is essential to prove a regular table of fees settled in pursuance of the act (p); but if the plaintiff fail upon the counts for

(i) See *Martyn v. Podger*, 5 Burr. 2631. Trespass for seizing the goods of John Martin under an execution against William Martin, the defendant proved the *feri facias* against the goods of William, and also that he seized the goods as William's, but did not prove the judgment; the Court, on a motion for a new trial, after a verdict for the plaintiff, held that the judgment ought to have been proved; but held also, that it ought to have been left to the Jury, whether the plaintiff was not in possession under a fraudulent bill of sale from William.

(k) *Bland v. Ansley*, 2 N. R. 331. Note, that the judgment-debtor had sold a house to the plaintiff, and whether the goods in that house were sold, or not, at the same time, was *matter of dispute*. If the judgment-debtor would have been liable to the plaintiff, in case of his failure, to the amount of the goods, he would, it seems, have stood indifferent.

(l) See the provisions of the stat. 29 Eliz. c. 4, and 32 Geo. II. c. 28. An action under the former of these statutes for taking more for a levy than the statute allows, may be maintained by the party against whose goods the writ was issued, although there were not goods to the amount of the debt and costs, and the sum overcharged is deducted out of the sum to be paid over to the creditor.

The statute of Eliz. does not apply to crown debts. *Stevens v. Rothero*, 3 B. & B. 143. *Peacock v. Harris*, 1 Salk. 332.

(m) *Supra*, 1335. And if the judgment be alleged in the declaration, it should also be proved. *Savage v. Smith*, 2 Bl. Rep. 1101.

(n) *Supra*, 1337.

(o) *Woodgate v. Knatchbull*, 2 T. R. 148.

(p) *Jacques v. Whitcomb*, 1 Esp. C. 361. *Martin v. Slade*, 2 N. R. 59. *Hannam v. Ormerod*, 1 Esp. C. 362, n.

PART
IV.Refusing vote,
&c.

the penalties, he may still recover the excessive payment in an action for money had and received (g).

In an action against a sheriff, or other returning officer, for refusing a legal vote, it seems to be settled that it is not sufficient merely to prove that the defendant obstructed the legal right of the plaintiff to vote, provided he acted *bona fide*, and to the best of his judgment; but that it is essential to show that he acted maliciously, and from some improper motive (r) (1).

* 1357

Sale by a
sheriff.

* Where a sheriff sells a term under a writ of *fiery facias*, which is afterwards set aside for irregularity, the produce of the sale being directed to be returned to the termor, the latter cannot afterwards maintain ejectment against the vendee (s).

Where a lessor in ejectment claims as purchaser from the sheriff, who sells under a *fiery facias* at the suit of the lessor, he should prove the judgment as well as the writ (t).

(g) *Lovell v. Simpson*, 3 Esp. C. 153. In *Martin v. Slade*, (2 N. R. 59), the plaintiff having been nonsuited for not proving the special counts, the Court refused to grant a new trial in order to let the plaintiff in to recover the excess on the money counts; but it is not intimated that the plaintiff might not have recovered for money had and received at the trial, had he made the point.

(r) See *Cullen v. Morris*, 2 Starkie's C. 577. *Sergeant v. Milward*, Luders, 248. The *Bridgwater* case, 1 Peck. 108, Orme's Dig. 242. The *Seaford* case, Simeon, 129; Orme's Dig. 251. *Drew v. Cotton*, 2 Lud. 245. 1 East, 563. n. Contrary to the opinion of Holt, C. J. in *Ashby v. White*, 2 Ld. Raym. 938; 6 Mod. 46; 1 Salk. 19; Holt, 524; 1 Brown, 45. And see *Grew v. Milward*, 2 Lud. 245.

(s) *Doe v. Thorn*, 1 M. & S. 425. That a sale of a chattel is valid, although the execution be afterwards set aside for irregularity, see *Dyer*, 363, pl. 24; 5 Co. 90; 13 Co. 20. But see *Turnor v. Folgate*, T. Ray. 73. And the sheriff cannot be treated as a trespasser (per Bayley, J. in *Doe v. Thorn*, 1 M. & S. 427). But *qu*, when the term is extended on an *elegit*, or forfeited on outlawry, and sold, and the judgment of outlawry is reversed. Cro. Jac. 246; 1 And. 277; Cro. Eliz. 278. [See *Yelv.* 180, note (2).]

The sheriff may justify as well under an irregular as under an erroneous judgment, so as the writ be not void, and a purchaser will gain a title under him; for they are not privy to the irregularity. Tidd, 924, 3d edit. 1 Ves. 195. A party may justify under an erroneous judgment, for it is the act of the Court, but not under an irregular one which has been set aside. 1 Str. 509. Tidd, 924, 3d edit. [See *Yelv.* 179. d. note (1)—180, note (2).]

(t) *Doe d. Bland v. Smith*, 2 Starkie's C. 199. *Burton v. Cole*, Carth. 443, *supra*, 520. So in trover by an assignee, under a sale

(1) [*Wheeler v. Patterson*, 1 N. Hamp. Rep. 88. *Jenkins & al. v. Waldron*, 11 Johns. 114. *Acc. Lincoln v. Hapgood & al.* 11 Mass. Rep. 350. *Contra. See Custis v. Lane*, 3 Munf. 579.]

Evidence of an assignment of a lease taken in execution by one who acts as under-sheriff, is evidence of an assignment, without proof of the appointment of the under-sheriff (*u*).

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Assignment.

A return by the sheriff being the official act of a public officer, is evidence against third persons. If he return a rescue, the Court will so far give credence to it as to issue an attachment in the first instance (*x*). So it is evidence against the defendant upon an indictment for a rescue, although not conclusive (*y*).

Return.

The sheriff's return that he has levied, is, it seems, evidence of the fact as against third persons (*z*); but *the * 1358 return that he has levied under a writ of *fi. fa.* does not afford even *prima facie* evidence that he has paid the money over to the judgment-creditor (*a*).

The debtor is a competent witness for the plaintiff in an action for an escape on mesne process, for he could neither plead the recovery in bar of an action for the debt, nor give it in evidence in reduction of damages (*b*). And an owner of goods, who has forcibly taken them out of the sheriff's possession, is a competent witness for the sheriff in an action for a false return of *nulla bona* to a writ of *feri facias*, to prove that the goods were not the property of the debtor; for the sheriff, after returning *nulla bona*, could not maintain an action against him for the rescue, in case the plaintiff were to succeed (*c*).

Competency.

by the Sheriff against the assignees of a bankrupt, upon an execution, issued before the bankruptcy, the plaintiff must prove the judgment as well as the writ, unless it appear that the defendants are sued as assignees. *Glazier v. Eve*, 1 Bing, 209. *Supra*, Part ii. p. 245. Part iv. 520. 1357.

(*u*) *Doc d. James v. Brown*, 5 B. & A. 243.

(*x*) *R. v. Elkins*, 4 Burr. 2129. *Gyfford v. Woodgate*, 11 East, 297.

(*y*) Per Ld. Ellenborough, in *Gyfford v. Woodgate*, 11 East, 297.

(*z*) *Gyfford v. Woodgate*, 11 East, 297; where, in an action against a judgment-creditor for having sued out an *alias fi. fa.* after a sufficient execution levied under the first, it was held, that the sheriff's returns on the two writs (which were produced by the plaintiff), in which he stated that he had forborne to sell under the first, and had sold under the second writ by the request of the plaintiff, were evidence of the fact for the defendant.

(*a*) *Cator v. Stokes*, 1 M. & S. 599.

(*b*) Per Abbott, C. J. in *Hunter v. King*, 4 B. & A. 209; B. N. P. 67. *R. v. Warden of the Fleet*, 12 Mod. 337.

(*c*) *Thomas v. Pearse*, 5 Price, 547. See *Pitcher v. Bailey* 8 East, 171, where it was held, that an officer guilty of breach of duty in permitting a prisoner to go at large on his promise to pay,

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IV.

On a charge against the warden of the Fleet for permitting the escape of prisoners, a prisoner who has escaped, but who has been retaken, is a competent * witness
 * 1359 against the warden, although he has given a bond conditioned for his being a true prisoner; for the record of conviction would be no evidence against the warden either in an action by him upon the bond, or in an action of false imprisonment by the witness (d).

STAMP.

1. Where necessary with reference to the subject-matter :—*Administration, Agreement, Appraisement, &c.* 1359.
2. Re-stamping, when necessary, 1374.
3. Several stamps, when necessary, 1375.
4. Stamp of a different denomination, when sufficient, 1377.
5. Objection, when to be taken, 1378.
6. Presumptive evidence that an instrument has been properly stamped, 1379.
7. The consequence of the want of a proper stamp, 1379.
8. For what collateral purposes an unstamped writing may be used, 1381.

Administrator.

Where a party is bound to prove his title as administrator, at the trial, by evidence of letters of administration, and it appears that he sues for a greater value than is covered by the *ad valorem* stamp of his letters of administration, they cannot be received in evidence (e).

But it is otherwise where the character in which the plaintiff sues is admitted by the plea: as, where an administrator sues upon promises to the intestate, and makes

could not, after being obliged to pay the money to the creditor, recover it from the debtor. And see *Eyles v. Funitney*, cited Peake's C. 144. A verdict against the sheriff in an action for a false return of *nulla bona*, does not, as in trover, vest any property in the goods in him, but they remain liable to a subsequent execution (*Underwood v. Mordant*, 2 Vern. 238). And where a debtor in execution escapes, though with the consent of the gaoler or sheriff, a recovery against the sheriff of less than the whole debt will not preclude the creditor from retaking the debtor, even although twelve months have expired, without a *scire facias*. B. N. P. 69, cites *Lenthal v. Gardiner*, Hil. 26 & 29 Car. II. per Hales. *Collop v. Brandley*, Trin. 31 Car. II. Th. Br. 262.

(d) *R. v. The Warden of the Fleet*, 12 Mod. 337. *R. v. Ford*, 2 Salk. 690.

(e) *Hunt v. Stevens*, 3 Taunt. 113.

profert of the letters of administration, and the defendant pleads merely *non assumptis* (f).

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* Where A. sued out a commission of bankruptcy on a debt due to him as executor, but the probate was insufficiently stamped, a sufficient stamp being afterwards affixed, it was held to be sufficient to support the commission (g).

* 1360
Administration

By the statute 55 Geo. III. c. 184, an agreement, of any minute or memorandum of an agreement (h), made

Agreement.

(f) *Thynne v. Protheroe*, 2 M. & S. 553. *Supra*, 548.

(g) *Rogers v. James*, 7 Taunt. 147; 2 Marsh. 425.

(h) A mere collateral writing not signed by the parties is not within the statute. A written paper delivered by the auctioneer to one to whom lands were let by auction, containing the description of the lands, the term for which they were let, and the rent, but not signed by the auctioneer nor any of the parties, was held to be admissible in evidence without a stamp (*Ramsbottom v. Tunbridge*, 2 M. & S. 434); for it was held to be no more than a mere declaration by the auctioneer, and not like an original minute. But in a similar case, where the note was signed by the auctioneer, it was held that a stamp was necessary (*Ramsbottom v. Mortley*, 2 M. & S. 445), although the name of the lessor was omitted; for it was evidence of part of a contract, although not of a complete contract, to satisfy the Statute of Frauds. *Ibid.* And see *Dalison v. Stark*, 4 Esp. C. 163; *supra*, 83.

A paper which operates but incidentally as evidence of an agreement, is admissible without a stamp. Notice of a dissolution of partnership is evidence to prove that a partnership once subsisted. *Wheldon v. Matthews*, 2 Chitty's R. 390.

Where a broker sought to recover for doing business by commission, it was held that a prospectus of the terms on which he did business was *functus officio* previous to the entering into a parol contract, and might be read, though unstamped. *Edgar v. Blick*, 1 Starkie's C. 464.

In an action for work and labour, a mere proposal and estimate made by the plaintiff, but not finally acceded to, is evidence for the defendant, without a stamp, in reduction of the demand (*Penniford v. Hamilton*, 2 Starkie's C. 475). In an action for not delivering goods manufactured by the defendant in consequence of an order from the plaintiff, a memorandum signed by the plaintiff only, describing the nature and quantity of the goods, but not specifying the price, may be given in evidence without a stamp, and it was held that the acceptance of the order, and the precise terms of the contract, might be proved by other evidence. *Ingram v. Lea*, 2 Camp. 521.

Where B. was directed by letter from C. to pay a sum of money to D. out of the proceeds of goods in the hands of B., and B. by letter to D. agreed to pay the money, it was held that this was not an agreement between B. and C., and therefore that an agreement stamp was improper; but that the order from B. to C. ought to have been stamped as an order for payment of money out of a fund which might or might not be available under the stat. 55. Geo. III. c. 184. *Furbank v. Bell*, 1 B. & A. 36. A cog-

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IV.

Agreement.

* 1362

* in England (i) under hand only, or made in Scotland without any clause of registration, (and not otherwise charged in that schedule, nor expressly exempted from all stamp-duty,) where the matter thereof shall be of the value of 20*l.* (k) or upwards, whether the same shall be only evidence of a contract, or obligatory upon the parties from its being a written instrument, together with every schedule, receipt, or other matter (l) put or * indorsed thereon, or annexed thereto, shall bear a 1*l.* stamp (m).

The schedule provides, that where divers letters shall be offered in evidence to prove any agreement between the parties who shall have written such letters, it shall be suf-

A *cognovit* requires no stamp (*Ames v. Hill*, 2 B. & P. 150), unless it contain matter of agreement (*Reardon v. Swaby*, 4 East, 188); neither does a mere notice to others of a dissolution of partnership (*Jenkins v. Blizard*, 1 Starkie's C. 418, Cor. Ld. Ellenborough); but it has been held that the instructions for advertising the dissolution in the Gazette, written in the form of an agreement, signed by the parties, and attested, required a stamp. *May v. Smith*, 1 Esp. C. 263.

It seems, that a mere acknowledgment in writing that money is due, requires no stamp. *Fisher v. Leslie*, 1 Esp. C. 426; per Abbott, C. J. Sitt. after Hil. 1822. *Israel v. Israel*, 1 Camp. 499. Contra, *Guy v. Harris*, Chitty on Bills, 428, n. And see *Barlow v. Broadhurst*, 3 Moore, 471; *infra*, 1367, note (p). See also *Watkins v. Hewlett*, 3 Moore, 215. So an instrument improperly stamped as a promissory note; see also *Barlow v. Broadhurst*, 4 Moore, 471. *infra*, 1365. See *Childers v. Boulnois*, 1 D. & R. 8. A written acknowledgment that a statement of payments made is correct requires no stamp. *Willard v. Moss*, 1 Bing. 134; and see *Jacob v. Lindsay*, 1 East, 460. *Barlow v. Broadhurst*, 4 Moore, 471. *Infra*, 1365.

(i) A letter written in England, agreeing to accept a bill drawn in Jamaica, requires a stamp. *Crutchly v. Mann*, 5 Taunt. 529.

(k) This is a substantive enactment, and not an exception, and does not operate unless the matter of agreement shall be of the value of 20*l.* or upwards; this supposes that the value of the contract is measurable in money. The clause, therefore, does not apply to a mere contract to marry (*Orford v. Cole*, 2 Starkie's C. 351), nor to the sale of several lots by auction, where the separate value of each lot is under 20*l.* *Emmerson v. Heelis*, 2 Taunt. 38.

(l) A schedule, or inventory, annexed to a deed or agreement, must be included in the calculation as part of the instrument (*Lake v. Ashwell*, 3 East, 326); but a schedule or inventory not annexed to the instrument, but merely referred to, is subject to a duty of 1*l.* 5*s.*, and if it contain 2,160 words or upwards, for every entire quantity of words after the first 1,080 is liable to a duty of 1*l.* 5*s.* See 55 Geo. III. c. 184, tit. *Schedule*.

(m) That is, where the agreement does not contain more than 1,080 words; but if more than 1,080 words, a stamp-duty of 1*l.* 15*s.* is payable; and for every entire quantity of 1,080 words over and above the first 1,080 words, a further progressive duty of 1*l.* 5*s.*

ficient if any one of such letters shall be stamped with a duty of 1*l.* 15*s.*, although the same shall in the whole contain twice the number of 1,080 words or upwards (*n*).

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The schedule also contains the exemptions already adverted to (*o*), as to any label, slip, or memorandum, containing the heads of insurances to be made by the corporations of the Royal Exchange Assurance, or London Assurance, of houses and goods from fire, and also any memorandum or agreement made between master and mariners of any coasting vessel, for wages.

Agreement.

Memorandum or agreement for granting a lease or tack, at rack-rent, of any messuage, land, or tenement, under the yearly rent of 5*l.* (*p*).

Or for the hire of any labourer, artificer, manufacturer, or menial servant (*q*).

Memorandum or agreement made for or relating to the sale of any goods, wares, or merchandise (*r*).

* Memorandum or agreement made between the master and mariners of any ship or vessel for wages, or any voyage coastwise from port to port in Great Britain. * 1363

Also letters containing any agreement not before ex-

(*n*) *Vide supra*, 79. Similar provisions are made by the statute 48 Geo. III. c. 149.

(*o*) *Supra*, 78, 79, 80.

(*p*) A building-lease under 5*l.* per annum is not within this exception. *Doe d. Hunter v. Boulcot*, 2 Esp. C. 595.

(*q*) *Supra*, 78.

(*r*) *Supra*, 78. A warranty of a horse is within these exceptions. (*Skrine v. Elmore*, 2 Camp. 407.) If a lease in writing contain also a contract for the sale of goods, it cannot be read unless it be stamped as a lease. (*Corder v. Drakeford*, 3 Taunt. 382.) Note, the reason assigned by Mansfield, C. J. was, that it was not intended that the defendant should buy the goods unless he had the lease of the premises. This case differs from that of *Grey v. Smith*, 1 Camp. 387, where a receipt for money and agreement being written on the same piece of paper, Ld. Ellenborough held, that a receipt-stamp warranted the reading of the paper as a receipt; but he said that if what followed had at all controlled or qualified what went before, he should have rejected the whole. See *Heron v. Granger*, 5 Esp. C. 269, where Ld. Ellenborough held that an agreement for the sale of goods need not be stamped, although it contained other stipulations; but it is to be observed that all those stipulations were connected with the sale of the goods. If a *cognovit* contain matter of agreement it must be stamped as an agreement. *Ames v. Hill*, 2 B. & P. 150. It seems, in general, that where two distinct and unconnected matters are written on the same parchment or paper, so that either may be rejected in toto, without altering or affecting the terms of the other, each may be read if properly stamped, just as if the other did not exist; but that if they be so connected as to qualify each other, neither can be read without a stamp, which will cover both.

PART
IV.

empted in respect of any merchandise, or evidence of such agreement, which shall pass by the post between merchants, or other persons carrying on trade or commerce in Great Britain, and residing, and actually being at the time of sending such letters, at the distance of fifty miles from each other (s).

Appraisement. Where nothing but the mere value of the goods is referred to appraisers, an appraisement-stamp upon the written valuation is sufficient (t). An appraisement * made merely for the private information of the person employing the valuer, is not liable to any duty (u).

* 1364

Apprentices. Money paid by parish officers as the consideration for taking an apprentice is not liable to the stamp-duty imposed by the stat. 8 Ann. c. 9, s. 35 (x). Nor is any duty payable where the premium is paid out of a public annual charitable subscription (y), or out of any charitable donation-fund belonging to the parish (z); or out of money given by a will to put out children apprentices (a). But where it is proved *aliunde* that a premium was paid, a mere recital in the deed that it was paid out of a charitable fund is not sufficient to prove the fact (b).

A stipulation that the master shall have part of the earnings of an apprentice does not render an additional duty necessary (c).

Award. An award in writing, and under seal, need not be stamped as a deed unless it be delivered as a deed (d).

(s) See the provisions of the stat. 32 Geo. III. *supra*, 79. An agreement between merchants residing within fifty miles of each other, for the outfit of a ship, requires a stamp. *Leigh v. Banner*, 1 Esp. C. 403. The letter of an agent written to a creditor residing above fifty miles from him is exempted (*Mackenzie v. Banks*, 5 T. R. 176), although it bind the agent, and not the principal; *semble*, *Ibid*.

(t) *Leeds v. Burrows*, 12 East, 1. See also *Perkins v. Potts*, 2 Chitty's R. 329.

(u) Under the stat. 46 Geo. III. c. 43, 48 Geo. III. c. 149, 55 Geo. III. c. 184, a valuation of parish-lands by two parishioners, for the purpose of making a rate, requires no stamp. *Atkinson v. Fell*, 5 M. & S. 240.

(z) *R. v. St. Petrox*, 4 T. R. 196.

(y) *R. v. St. Matthew, Bethnal Green*, 4 Burn, 388, 23d edit. 8 Mod. 365. See 44 Geo. III. c. 98, s. 190.

(z) *R. v. Skeffington*, 3 B. & A. 382.

(a) *R. v. Clifton-upon-Dunsmore*, 4 Burn, 389, 23d edit.

(b) *R. v. Skeffington*, 3 B. & A. 382.

(c) *R. v. Wantage*, 1 East, 601. And see 44 Geo. III. c. 98; and *R. v. Bradford*, 1 M. & S. 151; and stat. 48 Geo. III. c. 149; and *Gye v. Felton*, 4 Taunt. 876.

(d) *Brown v. Vassier*, 4 East, 584.

An arbitration bond does not require an agreement-stamp, although it contains stipulations as to the mode of paying costs (e).

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The appointment of an umpire by two arbitrators requires no stamp (f).

* By the 55 Geo. III. c. 184, drafts, or orders for the payment of money to the bearer, on demand, and drawn upon any banker (g), or person acting as a banker, who shall reside or transact the business of a banker within ten miles of the place where such drafts or orders shall be issued, are exempted from duty, *provided* such place be specified in such draft, and that it bear date on or before the day when issued, and do not direct the payment to be made by bills or promissory notes.

* 1365
Bankers drafts.

The effect of an alteration in a bill of exchange (h), has already been considered.

Bills of exchange.

(e) *In re Wansborough*, 2 Chitty's Rep. 40.

(f) *Rutledge v. Thornton*, 4 Taunt. 704.

(g) An unstamped draft drawn on A. B. bricklayer is not within the exception, *Castleman v. Ray*, 2 B. & P. 383; and an acknowledgment by the drawer at the bottom that a third person paid it for him, is not receivable to give effect to the draft. *Ibid.* A check bearing date after the day when issued required a stamp under the 31 Geo. III. c. 25. (*Allen v. Keeves*, 1 East, 435; 3 Esp. C. 281. *Whitwell v. Bennett*, 3 B. & P. 559.) As to an order for paying money out of a fund which may or may not be available, see *Firbank v. Bell*, 1 B. & A. 36. *supra*, 1360, note (h). An instrument imperatively as a promissory note, not being for the payment of any definite sum, is admissible in evidence under the count, on an account stated, although improperly stamped as a promissory note. *Barlow v. Broadhurst*, 4 Moore, 471.

(h) *Supra*, 294. By the stat. 55 Geo. III. c. 184, schedule, tit. Bill of Exchange,

Inland Bills of Exchange, draft, or order to the bearer, or to order, either on demand, or otherwise;

Not exceeding two months after date, or sixty days after sight.			For a longer Period.		
If ----	2l.	0s.	5l.	5s.	0l. 1s. 0d.
Above 5	5	5	20	0	0 1 6
Above 20	0	0	30	0	0 2 0
Above 30	0	0	50	0	0 2 6
Above 50	0	0	100	0	0 3 6
Above 100	0	0	200	0	0 4 6
Above 200	0	0	300	0	0 5 0
Above 300	0	0	500	0	0 6 0
Above 500	0	0	1000	0	0 8 6
Above 1000	0	0	2000	0	0 12 6
Above 2000	0	0	3000	0	0 15 0
Above 3000	0	0			1 5 0

A stamp for a bill payable at a time not exceeding two months after date, or sixty days after sight, is insufficient for a note pay-

PART
IV.

Bill of lading.

* 1367

Bill of sale.

* Goods carried from a port in Scotland to another in England are not *exported* so as to render the bill of lading liable to a stamp-duty (i).

* A bill of sale of a ship is not void although it omits to set out the true consideration, and is not stamped with an *ad valorem* stamp (k); but the parties are liable to a penalty for not setting out the true consideration (l).

able two months after sight. *Sturdy v. Henderson*, 4 B. & A. 592. A letter from A. to B. requesting him to pay to C. 600*l.* out of the first proceeds that should become due from goods of A. then in the hands of B. is an order for the payment of money, and an agreement-stamp is insufficient, although the latter formed part of a correspondence between the three parties. *Butts v. Swann*, 2 B. & B. 78. And see *Firbank v. Bell*, 1 B. & A. 36. *Supra*, 1360.

An inland bill for the payment of any sum of money weekly, monthly, or at any other stated periods, if made payable to the bearer, or to order, or if delivered to the payee, or some person on his or her behalf, where the total amount of the money thereby made payable shall be specified therein, or can be ascertained therefrom, is liable to the same duty as a bill of exchange for the like sum payable to the bearer or order. "Notes under the Lords Act need not be stamped. (*Tekell v. Casey*, 7 T. R. 670. *Bouring v. Edgar*, 1 B. & P. 270. Contra, *Pitman v. Haynes*, 7 T. R. 530.) A bill for the payment of 30*l.* and interest, three months after date, requires only a stamp applicable to a bill for a sum not exceeding 30*l.* *Pruessing v. Ing*, 4 B. & A. 204.

The stat. 55 Geo. III. c. 184, s. 12, imposes a penalty of 100*l.* on any person issuing a bill or note dated subsequently to the issuing, so as not in fact to become payable in two months, if made payable after date, or in sixty days, if made payable after sight after the day of issuing, unless it be stamped as a bill or note for payment of money at any time exceeding two months from the date, or sixty days after sight. This section, it is to be observed, merely imposes a penalty on the issuer, and does not, as it seems, preclude a *bona fide* holder without notice from giving it in evidence. See *Peacock v. Murrell*, 2 Starkie's C. 558. A note for the payment of 400*l.* (awarded to J. S.) to the representatives of J. S., three months after his decease, deducting thereout any interest or money which J. S. might owe to the defendant on any account, is not a promissory note to pay a definite sum at all events; and may, although improperly stamped, as a note, be given in evidence under the account stated. *Barlow v. Broadhurst*, 4 Moore, 471. And see *Watkins v. Hewlett*, 3 Moore, 211. A. having consigned goods to B. sent him the following order; pay to C. D. the proceeds of a shipment of goods, value about 2000*l.* consigned by me to you; B. consented by writing; held, that neither of these writings required a stamp as a bill, draft, or order for payment of money, &c. *Jones v. Simpson*, 2 B. & C. 318.

(i) *Scotland v. Wilson*, 5 Taunt. 533; 1 Marsh. 204, under the stat. 48 Geo. III. c. 149. But a 3*s.* stamp-duty is imposed by the stat. 55 Geo. III. c. 184, on bills of lading of goods carried coastwise.

(k) *Robinson v. Macdonnell*, 5 M. & S. 228.

(l) By the stat. 55 Geo. III. c. 184, s. 22. See *Upstone v. More-*

A bond conditioned for not converting a house to a particular purpose does not require an *ad valorem* stamp (*m*). Neither does a covenant to pay an annuity as a consideration for giving up a trade (*n*) require an *ad valorem* stamp, although the covenantor was to have possession of a house for the purpose of carrying on the business.

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IV.

A bond conditioned for the safe custody and production of a box containing the subscriptions of a benefit club, is within the exemption in the 33 Geo. III. c. 54, s. 4 (*o*).

If several persons bind themselves in a penalty by one bond, conditioned for the performance by each and every of them of the same matter, one stamp only is requisite (*p*), for it is all one transaction. A bond conditioned for the payment of annual rent for a definite period ought to be stamped according to the aggregate amount of the whole rent secured (*q*). * Where a bond is conditioned for the payment of all sums of money advanced and to be advanced, it ought to be stamped as for an unlimited sum, although a sum certain be specified as a penalty (*s*). * 1368

A *cognovit* requires no stamp unless it contain matter of agreement (*t*). *Cognovit.*

Close copies of law proceedings may be used as evidence without any additional stamp (*u*). *Copies.*

A copy of a judgment in the House of Lords requires no stamp (*x*).

land, 2 B. & C. 10, the word date is intended to mean the time of payment, on the face of the bill. *lb.*

A promissory note for 40*l.* payable to *A. B.* or bearer, is in law payable on demand; and therefore requires a 5*s.* stamp under the statute 55 Geo. III. c. 184, schedule, Part i. tit. Promissory Note, *Whitlock v. Underwood*, 2 B. & C. 157.

(*m*) *Hughes v. King*, 1 Starkie's C. 119.

(*n*) *Leburn v. Warrington*, 1 Starkie's C. 162. Under the stat. 48 Geo. III. c. 149, which imposes an *ad valorem* duty upon the conveyance of any lands, tenements, rents, annuities, &c.

(*o*) *Carter v. Bond*, 4 Esp. 253.

(*p*) *Bowen v. Ashley*, 1 N. R. 274. By the stat. 55 Geo. III. c. 184, tit. *Bond*, where the sum to be recovered is wholly unlimited, a stamp of the value of 2*s.* is requisite. Where the sum to be recovered is limited to a particular amount, the same duty is payable as if that sum were payable.

(*q*) *Attree v. Anselcomb*, 2 M. & S. 88. See *Collins v. Collins*, 2 Burr. 820. *Walcott v. Goulding*, 8 T. R. 126. *Willoughby v. Swinton*, 6 East, 550.

(*s*) *Scott v. Allsop*, 2 Price, 20.

(*t*) *Ames v. Hill*, 2 B. & P. 150. *Reardon v. Swaby*, 4 East, 188.

(*u*) *Doe d. Lucas v. Fulford*, 1 Bl. Rep. 288.

(*x*) *Jones v. Randall*, Cowp. 17; 1 Bl. Rep. 280.

PART
IV.Conveyance,
&c.

A conveyance to trustees, in trust, to sell, with a primary trust to pay all the other creditors, and a resulting trust, as to the residue, to pay to the parties conveying, does not require an *ad valorem* stamp. The stat. 55 Geo. III. c. 184, sch. 1, tit. *Conveyance*, operates upon actual sales between vendor and vendee only, and therefore a common deed-stamp is sufficient (y).

Deed of com-
position.

A composition-deed between a debtor and his creditors, though executed by a number of creditors, requires but one stamp (z).

Deed.

It seems to be a general principle, that where several concur in the same transaction, although each be severally bound, and the deed or covenant be the separate deed or covenant of each, one stamp only is requisite. * As, if a debtor compound with his creditors, and each creditor executes the deed, covenanting either to give further day of payment, or to accept of a certain sum as a composition (i).

* 1369

A deed indorsed on a former deed, as a further security for advances made and to be made under the first deed, is exempted from an *ad valorem* duty if the first deed be stamped with an *ad valorem* stamp (a).

Ejectment.

Where seventeen copies of a declaration in ejectment had been ingrossed on both sides of the paper, the Court set them aside as irregular (b).

Foreign
instrument.

An instrument made in a foreign country must be stamped according to the law of that country (c); but until the law of that country be proved, it will be presumed that no stamp is requisite (d).

A contract made at sea requires no stamp (e).

(y) *Coates v. Perry*, 3 B. & B. 48. An assignment by indenture of a judgment-debt does not require an *ad valorem* stamp, but only an ordinary deed-stamp, *Warren v. Howe*, 2 B. & C. 261.

(z) See the observations of Mansfield, C. J. in *Bowen v. Ashley*, 1 N. R. 274. By the stat. 55 Geo. III. c. 184, schedule, tit. *Composition*, a duty of ll. 15s. is payable, with a further progressive duty for every entire quantity of 1,060 words, over and above the first 1,060.

(i) Per Mansfield, C. J. *Bowen v. Ashley*, 1 N. R. 278. A deed not otherwise charged in the schedule to the Act 55 Geo. III. c. 184, nor expressly exempted, is liable to a duty of ll. 15s. and also to a progressive duty of ll. 5s. for every additional quantity of 1,060 words.

(a) Under the stat. 48 Geo. III. c. 149. *Robinson v. Macdonnell*, 5 M. & S. 228.

(b) *Doe d. Irwin v. Roe*, 1 D. & R. 562. See the stat. 55 Geo. III. c. 184.

(c) *Alves v. Hodgson*, 7 T. R. 241. *Clegg v. Levy*, 3 Camp. 166. *Snath v. Mingay*, 1 M. & S. 87. 90.

(d) *Clegg v. Levy*, 3 Camp. 166.

(e) *Ximenes v. Jaques*, 1 Esp. C. 311.

An instrument made here for the performance of acts abroad is liable to the stamp-laws of this country (*f*). A bill of exchange indorsed in Ireland with blanks being left for the date and time of payment, and name of the drawee, and completed in England, is to be considered by relation as a bill drawn in Ireland (*g*).

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IV.

Foreign
instrument.

* The articles of a Swedish ship made in Sweden, and deposited by the captain on his arrival in England with the Swedish consul, was held to be admissible, without a stamp, to show the terms on which a Swedish sailor was subsequently hired in London (*h*). * 1370

A lease (*i*) for years at a pepper-corn rent, in consideration of a sum certain, does not require an *ad valorem* stamp under the stat. 48 Geo. III. c. 149, but merely a lease-stamp (*k*). A lease containing several distinct demises of several tenements, at several rents, commencing from different periods, ought to be stamped, not according to the aggregate of the rents, but with a stamp equal in amount to the aggregate of the duties on the several demises (*l*).

Lease.

A newspaper may be read in evidence without a stamp (*m*).

A mere extension of the time of a ship's sailing does not render a new stamp on a policy of insurance necessary (*n*). Policy.

(*f*) *Stonelake v. Babb*, 5 Burr. 2673.

(*g*) *Snaith v. Mngay*, 1 M. & S. 87.

(*h*) *Winbled v. Malmberg*, 2 Esp. C. 454.

(*i*) For the decisions upon the point, whether an instrument is to be considered as an agreement, or a lease, *vide infra*, tit. *Use and Occupation*.

(*k*) *Roe v. Chenhals*, 4 M. & S. 23. But by the stat. 55 Geo. III. c. 184, tit. *Lease*, where a lease is granted in consideration of a fine or premium, at a yearly rent not exceeding 20*l.*, or without any rent, the same duty is payable as for the conveyance on a sale of lands of the same amount, except in cases of leases for a life or lives, not exceeding three, and leases for a term absolute, not exceeding twenty-one, by ecclesiastical bodies.

(*l*) *Boaze v. Jackson*, 3 B. & B. 185. But no fraud being intended the Court refused to set aside the verdict on account of the insufficiency of the stamp.

(*m*) *R. v. Pearce*, Peake's C. 75.

(*n*) *Kensington v. Inglis*, 8 East, 273. Neither does a memorandum giving leave to put back and discharge part of the cargo, the ship being too deep in the water. *Weir v. Aberdeen*, 2 B. & A. 320. Nor an alteration rendered necessary by circumstances after the ship has sailed, by which the voyage described as from *A*. to *B*. is altered, by adding *E*. or *F*. *Ramstrom v. Bell*, 5 M. & S. 267. See the stat. 35 Geo. III. c. 63, s. 13, which provides that the Act shall not extend to prohibit the making any lawful alteration in the terms or conditions of any policy. *Supra*, 1148, note (*q*).

PART
IV.

Policy.

A policy on goods to be thereafter declared * and valued, which, in fact, covers several distinct interests, which are afterwards declared and indorsed upon the policy, cannot be read unless it be stamped according to the fractional parts of 100*l.* included in each separate interest, although the stamp be sufficient to cover the whole amount (o).

A policy of insurance effected without a stamp is an absolute nullity (p), and cannot be rendered valid by a stamp subsequently affixed by the commissioners on payment of a penalty (q).

A *postea* cannot be read in evidence in another without cause being stamped (r).

Receipt.

* 1372

A paper in the hand-writing of a party, containing acknowledgments of sums paid at specified times, upon the times of payment requires a stamp (s). If a * tradesman write 'settled' under his bill, and subscribe his initials, he is liable to a penalty for giving a receipt without a stamp (t). A mere acknowledgment, not of the payment of money, but that money is due and owing, requires, it seems, no stamp (u).

(o) *Rapp v. Alnutt*, 15 East, 601. The stat. 35 Geo. III. c. 63, s. 1, imposes a duty of 2*s.* 6*d.* for every 100*l.*, and a like duty for every fractional part of 100*l.* Sect. 14 avoids every such contract unless properly stamped. The stat. 48 Geo. III. c. 149, schedule, tit. *Policy of Assurance*, provides, that if separate interests shall be included in one policy, the duty shall be charged in respect of each and every fractional part of 100*l.* as well as in respect of every full sum of 100*l.* insured upon every separate and distinct interest.

(p) By the stat. 35 Geo. III. c. 63, s. 14 & 15.

(q) *Roderick v. Hovil*, 3 Camp. 103.

(r) *R. v. Hammond Page*, 2 Esp. C. 649, in the note.

(s) *Wright v. Shawcross*, 2 B. & A. 501, in the note. But it was intimated by the Court, according to the report of this case, that the case of an account current would be different, for there the sums stated to be received are not written in the account upon the receipt of the money, but long after, and only amount to admissions of money received at an antecedent time. This case is very shortly reported, and the distinction stated to have been made by the Court between a written acknowledgment made at the time of payment, and one made at a subsequent period, is not a very clear and distinct one. A bill of parcels subscribed "settled by two bills, one at nine and the other at twelve months," requires (as has been held) a receipt-stamp. (*Smith v. Kelly*, Peake's C. 25, *n.* or an agreement-stamp, according to the report 4 Esp. C. 249.) So, an acknowledgment of having received acceptances, accompanied with an undertaking to provide for them, requires, it is said, a receipt-stamp. *Scholey v. Walsby*, Peake's C. 24.

(t) *Spawforth v. Alexander*, 2 Esp. C. 621.

(u) Thus, a writing containing the words and letters i. o. u. eight guineas, is neither a receipt, nor a promissory note, and is evidence

A receipt is admissible when stamped as such, although it notices the terms or consideration of payment (x); as, where a parish officer gave a receipt to the plaintiff in these terms, "received of A. B. a bill at two months for 35*l.*, which, when paid, will discharge him from the expenses of an illegitimate child, &c." The child afterwards dying, it was held that the document, properly stamped as a receipt, was evidence in an action brought to recover back the money; for the action was brought not on any agreement contained in that paper, but on the ground that upon the facts of the case the money was recoverable. The receipt merely showed that the money had been paid on account of the maintenance of a bastard child (y); but if the terms of acknowledgment * be connected with, and qualified by, the terms of an agreement contained in the same instrument, it cannot, it seems, be read as a receipt without an agreement stamp (z).

PART
IV.

Receipt.

* 1373

A receipt for money paid to deputy receivers requires no stamp, though signed by their clerk (a).

Where the indorsements on a bond had left no space for receipts on subsequent payments, it was held that such receipts written on plain paper, and annexed to the bond, were admissible in evidence (b). It seems that an indorsement by a bailiff on a warrant issued on a *fi. fa.* acknowledging the receipt of the levy money, is admissible in an action against the bailiff's surety, to prove the receipt of the money without a stamp (c).

Where an agreement between landlord and tenant open- Surrender.

without a stamp. *Fisher v. Leslie*, 1 Esp. C. 426. *Israel v. Israel*, 1 Camp. 499; and per Abbott, L. C. J. *Guy v. Davis*, Chitty on Bills, 428. n.

(*z*) *Watkins v. Hewlett*, 1 B. & B. 1.

(y) *Ib.* Per Richardson, J.—Note, Burrough, J. seems to have considered that a receipt would be evidence of an agreement. He says, "Suppose there were a receipt for 500*l.* for building a house, would that be incapable of being produced in evidence as being proof of an agreement?" A receipt for the price of a horse, with the words subjoined, "warranted sound," upon a receipt-stamp, is admissible without an agreement-stamp. (*Skrine v. Elmore*, 2 Camp. 407. *Brown v. Frys*, Devon sum. assizes, Cor. Lawrence, J. there cited; and see 2 Atk. 135.) But this rests upon the exception as to agreements relating to the sale of goods, &c.

(z) *Grey v. Smith*, 1 Camp. 387, Cor. Ld. Ellenborough. And see *Corder v. Drakeford*, 3 Taunt. 382.

(a) *Edden v. Read*, 3 Camp. 338.

(b) *Orme v. Young*, 4 Camp. 336.

(c) *Perchard and another v. Tindall*, 1 Esp. C. 394.

PART
IV.

Warrant of attorney.

Re-stamping.
Stamp discharged by satisfaction.Alteration whilst in *seri*.

rates as a surrender of a term of years by the latter to the former, the agreement must be stamped as a surrender (*d*).

A defeazance on a warrant of attorney to confess judgment does not require a stamp in addition to that imposed on the warrant of attorney (*e*).

* 1374

* 2dly. It is a general rule that a stamp which has once been used for a particular purpose cannot be again used for a similar purpose. Where a redeemable annuity was granted, and afterwards redeemed, and the deeds delivered up uncanceled, it was held, that on a re-delivery of the same deeds to secure a subsequent advance, fresh stamps were necessary (*f*). So affidavits used on showing cause at chambers cannot be used in Court unless they be re-sworn and re-stamped (*g*). But an affidavit defective for want of title may be intitled, and re-sworn without a fresh stamp (*h*).

An instrument altered whilst in *feri*, and before it is completed, requires but one stamp. As, where a contract is signed by one party, and, previous to the accession of the other, a fresh stipulation is added (*i*), or another obligor is added to a bail-bond before it has been accepted by the obligee (*k*), or a promissory note before it is negotiated, is converted into a bill of exchange in furtherance of the original intention of the parties (*l*); or the date on a

(*d*) *Williams v. Sawyer*, 3 B. & B. 70. The stat. 55 Geo. III. c. 184, sch. 1, tit. *Surrender*, requires a stamp of the amount of ll. 15s.

(*e*) *Cawthorne v. Holben*, 1 N. R. 279; as to the stamp, see *Barrow v. Mashiter*, 4 East, 431. By the stat. 55 Geo. III. c. 184, the duty is the same as upon a bond to the same amount. *Qu.* whether an authority to a proxy to vote requires a stamp under the stat. 55 Geo. III. c. 184, schedule, tit. *Letter of Attorney*, which imposes a general duty of ll. 15s. on letters or powers of attorney. See *Monmouth Canal Company v. Kendall*, 4 B. & A. 453.

(*f*) *Hammond v. Foster*, 5 T. R. 635. It was also held that a memorial was requisite.

(*g*) 4 Moore, 414.

(*h*) *Prince and others v. Nicholson*, C. B. Mich. 1813, Mann. Ind. 367. And see 3 Taunt. 469.

(*i*) *Knight v. Crockford*, 1 Esp. C. 189.

(*k*) *Matson v. Booth*, 5 M. & S. 223. And note, that the alteration being made with the concurrence of the agent of the other obligors, the alteration does not avoid the bond. *Ibid.* and *Zouch v. Clay*, 1 Vent. 185; 2 Keb. 872. 881; 2 Lev. 35. *Markham v. Gonaston*, Moor, 547; Cro. Eliz. 626. [*Supra*, Vol. II. 481, note (1).]

(*l*) *Webber v. Maddocks*, 3 Camp. 1; and *vide supra*, 293.

bill of * exchange is altered after acceptance with the assent of all parties (m).

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IV.

Where a bill of sale of a ship mis-recited the certificate of registry, and was re-executed by consent of all parties after the mistake had been rectified, it was held that a new stamp was not necessary (n).

Alteration in
feri.

And it seems to be a general rule, that a mere mistake in the terms of an instrument may be altered so as to make it correspond with the real intention and meaning of the parties, without a fresh stamp; as where an agent makes a mistake in a policy of insurance by declaring the interest in a wrong name (o).

Mistake.

Where an indorsement was made on an annuity-deed after the execution of the deed, containing a clause of redemption, it was held that such indorsement required a stamp (p). So, where a written wager was afterwards doubled by an indorsement on the original, a second stamp was held to be necessary; but there being one stamp only, the instrument was held to be evidence of the first wager (q).

Second stamp,
when necessary.

3dly. An affidavit intitled in several causes cannot be read unless it be impressed with the corresponding number of stamps (r). If several admissions of corporators as free-men be written on the same paper, stamped but with one stamp, the first admission only can be read (s); so if two separate affidavits be written * on the same paper (t). A lease containing several distinct demises at distinct rents,

Several
stamps.

* 1376

(m) *Johnson v. Garnett*, 2 Chitty's R. 122. But see *Walton v. Hastings*, 2 Chitty's R. 121.

(n) *Cole v. Parkin*, 12 East, 471. An alteration of a bill by a drawer, who has a general authority to draw on the acceptor, does not render a new stamp necessary. *Johnson v. Gibb*, 2 Chitty's R. 123.

(o) *Robinson v. Touray*, 1 M. & S. 218. *Sawtell v. Loudon*, 5 Taunt. 359; *supra*, 1148.

(p) *Schumann v. Weatherhead*, 1 East, 537. But see *Herne v. Hale*, 3 Esp. C. 237. An annuity deed and memorial require but one stamp, *Cooke v. Jones*, 15 East, 237.

(q) *Robson v. Hall*, Peake's C. 127.

(r) *Anon.* 3 Taunt. 469. *R. v. Carlile*, 1 Chitty's R. 451.

(s) *Gilby v. Lockyer*, Doug. 217. So where the captain and crew were released, and the captain's name stood first, and the instrument bore but a single stamp, and the release was first tendered to him, it was held that he was competent. *Perry v. Bouchier*, 4 Camp. 80.

(t) 1 Chitty's R. 452, n.

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IV.

Where one paper contains several matters.

must be stamped according to the aggregate of the stamps required for the several demises (u).

If different matters (x) wholly unconnected be written on the same parchment or paper, they may, it seems, be considered as distinct and detached instruments with reference to stamp-duties; but if the two parts qualify each other, such a stamp as will cover both is requisite (y). Where a promissory note was given without a stamp, and the maker indorsed upon it a memorandum that he had paid a certain sum for interest, it was held that the memorandum might be read as an admission that a principal sum was due which would yield so much interest (z).

Single stamp, when sufficient.

An agreement by several subscribers to a common fund (a), or of reference by several underwriters (b) of a policy, or an assignment of the prize-money of several seamen on board a privateer payable out of the same fund, requires but one stamp (c).

Where two parts of an agreement are signed by both plaintiff and defendant, and the plaintiff proves that one of those parts, properly stamped, is in the possession of the defendant, who has had notice to produce it, but does not produce it, the plaintiff may prove the agreement by means of the unstamped part in his own possession (d).

* 1377
Of different denomination.

* 4. By the 55 Geo. III. c. 184, s. 10, all instruments upon which stamps shall have been used of an improper denomination or rate of duty, but of equal or greater value in the whole, with or than the regular stamps, shall be deemed valid and effectual in law, except in cases where the stamp used on such instruments shall have been speci-

(u) *Boaze v. Jackson*, 3 B. & B. 185; *supra*, 76.

(x) *Vide supra*, 75, note (o).

(y) *Corder v. Drakeford*, 3 Taunt. 382. *Grey v. Smith*, 1 Camp. 387. *Heron v. Granger*, 5 Esp. C. 269. *Ames v. Hill*, 2 B. & P. 150; *supra*, 1362, note (r).

(z) *Manley v. Peel*, 5 Esp. C. 121.

(a) *Davis v. Williams*, 13 East, 232.

(b) *Goodson v. Forbes*, 6 Taunt. 171. [1 Marsh. 525. S. C.]

(c) *Baker v. Jardine*, 13 East, 235, n. *Vide supra*, 1368. B. copies a letter containing an agreement between himself and A. and acknowledges it by a memorandum written on the copy; B.'s father indorses a guaranty upon it, referring to the written copy; one stamp was held to be sufficient. *Stead v. Liddard*, 1 Bing. 196.

(d) *Waller v. Horsfall*, 1 Camp. 501. *Garnons v. Swift*, 1 Taunt. 507, n.

ally appropriated to any other instrument, by having its name on the face thereof (e).

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5. An objection to the want of a stamp must be taken at the trial, before the instrument is read, and the * party objecting ought to be prepared with the statute which requires the stamp, and to sustain his objection by collateral proof, where it is necessary. If the defect appear collaterally, the objection cannot be removed by the contents of the instrument itself. Thus, where it appears that 12*l.* has been paid to the master as a premium with an apprentice, a recital in the deed itself is not admissible to show that the premium was payable out of a public charitable fund (f). But it seems that it would be otherwise if the objection should appear from the instrument alone (g).

* 1378
Objection,
when taken,
&c.

It is sufficient if the instrument bear a proper stamp when it is produced upon the trial, although it was not stamped when it was executed, or when it was produced on a former occasion (h); and the adversary cannot show

Time and
manner of
stamping.

(e) See *Robinson v. Drybrough*, 6 T. R. 317, where it was held that articles of agreement under seal could not be received in evidence, being stamped with an agreement-stamp of the same value, but differently formed. See also *Manning v. Livie*, Bayley on Bills, 37; and *Farr v. Price*, 1 East, 55, where it was held that a promissory note made after the passing of the stat. 37 Geo. III. c. 80, but stamped with a stamp of the value of 9*d.* instead of 8*d.* could not be received in evidence. See also *Chamberlain v. Porter*, 1 N. R. 30. The stat. 37 Geo. III. c. 136, enacted, that bills and notes subsequently made, and stamped with an improper stamp, but of equal or greater value than the stamp required, might be stamped by the commissioners on payment of the duty and a penalty. In *Taylor v. Hague*, 2 East, 414, where the proper stamp on a promissory note was 1*s.* 6*d.* applicable to three different funds, and a stamp of 2*s.* value was imposed payable to the same funds in larger proportions, it was held that the stamp was sufficient. And see *Aitchison v. Sharland*, 1 Esp. C. 292. Where five guineas was agreed to be given as an apprentice fee, and that sum was inserted in the indenture, and the duty paid according to the stat. 8 Anne, c. 9, it was held to be sufficient, although, in fact, four guineas only were paid; for the full sum received, given, &c. was inserted, and the duty paid for it, and the stamp was of the same description, and the duty appropriated to the same fund, as if four guineas only had been paid. *R. v. Keynsham*, 5 East, 309. And see *R. v. Inhabitants of Quainton*, 2 M. & S. 338.

Where a deed was produced, properly stamped according to the stat. 48 Geo. III. c. 149, it was held to be admissible in evidence, although not stamped with a stamp of less value, such as was requisite at the time when the deed was executed. *Dec d. Dyke v. Whittingham*, 4 Taunt. 20.

(f) *R. v. Skeffington*, 3 B. & A. 382.

(g) *Ibid.* and see the opinion of Holroyd, J. in that case.

(h) *R. v. The Bishop of Chester*, 1 Str. 624. *Rogers v. James*, 7

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that the instrument was not stamped when made (i), unless the commissioners are expressly prohibited from subsequently affixing a stamp (k).

The instrument itself must bear the stamp, it is not sufficient to produce another piece of parchment or paper with the stamp annexed to it (l).

- * 1379 * Where the instrument contains several demises to several tenants with but one stamp, it is a matter of circumstantial evidence to show to which of the demises the stamp is applicable (m).

Presumptive
evidence of
stamp.

6. Previous to the admission of secondary evidence to prove the contents of a deed or other instrument which has been lost or destroyed, evidence is necessary to show that it was properly stamped (n). But the fact that it was so stamped may be presumed from circumstances. Where an apprentice had regularly served under an indenture executed thirty years ago, and the parish in which the apprentice was settled under that indenture had relieved him for the last twelve years, it was held that the sessions had rightly presumed that the indenture was stamped, although it was proved on the other side by the deputy registrar and comptroller of the apprentice duties, that it did not appear that any such indenture had been stamped or enrolled (o); for the presumption of law is *omnia rite esse acta*; and against the negative evidence, the justices below might reasonably set the possibility of an irregularity in the returns made to the office. And where a party refuses to produce an agreement after notice given, it will be pre-

Taunt. 147; 2 Marsh. 425. Even where a motion has been made on the express ground that the stamp is insufficient. *Burton v. Kirkby*, 7 Taunt. 174. [2 Marsh. 480. S. C.]

(i) *Wright v. Riley*, Peake's C. 173. And see *R. v. The Bishop of Chester*, 1 Stra. 624. The statutes do not avoid deeds which are not properly stamped, but prevent them from being read in evidence whilst unstamped, and subject the parties to penalties. *Ibid.* See 8 Mod. 364.

(k) As in the case of a policy of insurance under the statute 35 Geo. III. c. 63, s. 14. 16. *Roderick v. Hovil*, 3 Camp. 103. *Rapp v. Allnutt*, cited 3 Camp. 106, n. Or an indenture of apprenticeship under the stat. 8 Ann. c. 9. *R. v. Chipping Norton*, 5 B. & A. 412. And 31 Geo. III. c. 25, s. 19. as to bills of exchange, &c.

(l) 2 Stra. 716. 2 Ld. Ray. 1445.

(m) *Doe d. Copley v. Day*, 13 East, 241; *supra*, 76.

(n) *Supra*, Vol. I. p. 354.

(o) *R. v. Long Buckby*, 7 East, 45. And see *R. v. East Knoyle*, 4 Burn, 441; Burr. S. C. 151. *R. Badby*, 1 Const, 490.

sumed, as against him, that it is properly stamped until the contrary appear (p).

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7. Where a stamp is necessary, an unstamped instrument cannot be read in evidence for the purpose of giving to it any legal operation (q); neither can its place be supplied by parol evidence. Thus, a bill of sale unstamped cannot be received in evidence, neither * can the vendee resort to parol evidence (r). And it makes no difference that the agreement is *functus officio*. Thus, an agreement to assign an apprentice cannot without a stamp be received as evidence in a settlement case after the expiration of the apprenticeship (s).

Consequence
of want of
stamp.

* 1380

A note given as an apprentice fee cannot be enforced, the indentures of apprenticeship being void for want of a proper stamp; although the master has, in fact, maintained the apprentice for a time (t). Where a creditor is paid by an unstamped draft, he may recover on his original demand, although he has neglected to present the draft for payment (u).

(p) *Crisp v. Anderson*, 1 Starkie's C. 35.

(q) By the provision of the stat. 9 & 10 W. III. c. 25, s. 59, which enacts *inter alia*, that no such record, deed, instrument or writing, shall be pleaded or given in evidence in any Court; or admitted in any Court to be good, useful, or available in law or equity, until the vellum, parchment, or paper on which such deed, instrument, or writing shall be written or made, shall be marked or stamped with a lawful mark or stamp. These provisions have been continued by the subsequent Acts. See 3 Taunt. 116; and see the statutes 37 Geo. III. c. 19, s. 3; 55 Geo. III. c. 184, s. 8, which re-enacts the provisions of former Stamp Acts. Service under indentures of apprenticeship not stamped gives no settlement. *R. v. Edgworth*, 3 T. R. 353. And see *Hunt v. Stevens*, 3 Taunt. 116. The payment of money into Court admits the validity of the instrument. *Israel v. Benjamin*, 3 Camp. 40. The want of a stamp does not avoid a sale of a ship by a bill of sale. *Robinson v. Macdonnell*, 5 M. & S. 228.

(r) Per Ld. Kenyon, *Rolleston v. Hibbert*, 3 T. R. 406. And see *Brewer v. Palmer*, *supra*, 81; 3 Esp. C. 218. P. C. in *White v. Wilson*, 2 B. & P. 116.

(s) *R. v. Inhabitants of St. Paul, Bedford*, 6 T. R. 452.

(t) *Jackson v. Warwick*, 7 T. R. 121. Where the plaintiff declared in assumpsit for meat, drink, &c. supplied to the defendant's apprentice, and it appeared that the indentures were void for want of a stamp, the plaintiff was nonsuited. *Aldridge v. Ewen*, 3 Esp. 188. Cor. Ld. Kenyon.

(u) *Wilson v. Vysar*, 4 Taunt. 288; *supra*, 307. *Wilson v. Kennedy*, 1 Esp. C. 245. *Tyte v. Jones*, 1 East, 58, n. And see *Puckford v. Maxwell*, 6 T. R. 52. *Alves v. Hodgson*, 7 T. R. 241. *White v. Wilson*, 2 B. & P. 116. Where such a draft is given in payment of a demand before the time of credit is expired, payable at the

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IV.

Consequence
of want of
stamp.

* The giving of a bill of exchange or note without stamp, or improperly stamped, in discharge of a debt, will not preclude the creditor from proving his original debt (j). Such a bill is no payment, although the parties would have paid it if presented in due time (w).

The same rule applies where the original document is in the adversary's possession (x), and in that case, it is not sufficient to produce a copy properly stamped. Where a schoolmaster sought to recover on the ground of a removal of a scholar without notice, contrary to the terms of a printed prospectus delivered to the defendant, it was held, that the identical copy so delivered must be produced duly stamped. It has been seen that parol evidence is inadmissible, although the instrument has been lost (y), or even destroyed by the party who objects to the want of a stamp (z); yet, in such a case, or where the adverse party refuses to produce the instrument, it seems that it will be presumed to have been properly stamped until the contrary appear (a). But if the adversary produce the instrument upon notice, it cannot be read unless it be properly stamped (b).

May be used
for some colla-
teral purposes.

* 1382

8. But an unstamped instrument, although inadmissible where a stamp is requisite, to give effect to the instrument, may yet be receivable in evidence for collateral purposes. Thus, upon an indictment for the forgery of * the instrument, it is always receivable in evidence, though unstamped (c). So an unstamped cheque is admissible for the purpose of identifying property stolen, on an indictment for larceny (d). But it seems, that in general, an unstamped instrument cannot be read in a criminal case as

expiration of the credit, the creditor cannot sue on the original debt until the expiration of the credit. *Stears v. Wells*, 1 Esp. C. 317.

(j) *Brown v. Watts*, 1 Taunt. 353.

(w) *Wilson v. Vysar*, 4 Taunt. 288.

(x) *Williams v. Stoughton*, 2 Starkie's C. 292. Cor. Ld. Ellenborough, C. J.

(y) *R. v. Castlemorton*, 3 B. & A. 588; *supra*, 478.

(z) *Rippiner v. Wright*, 2 B. & A. 478.

(a) *Crisp v. Anderson*, 1 Starkie's C. 35.

(b) *Doe d. St. John v. Hore*, 2 Esp. C. 724.

(c) *R. v. Hawkeswood*, Leach, 295; East's P. C. 955. *R. v. Morton*, ib. *R. v. Reculist*, ib. 956. *R. v. Davis*, ib. and *supra*, 578. Starkie's Crim. Pl. 110. *R. v. Hawksworth*, 1 T. R. 450. So trover lies for an unstamped instrument. *Scott v. Jones*, 4 Taunt. 865.

(d) *R. v. Pooley*, 3 B. & P. 316.

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evidence for the purpose for which it was intended. Thus, on an indictment for setting fire to a house with intent to defraud an insurer, an unstamped policy is not admissible in evidence to prove the contract of insurance (e). And upon an indictment against a clerk for embezzling his master's money, it has been held that an unstamped receipt, given by the servant to the debtor who paid him the money, was not evidence against the prisoner (f). Collateral purposes.

And even in a civil action, an agreement, although unstamped, is admissible for the collateral purpose of proving usury (g). So, an illegal and unstamped policy may be read in evidence to prove the effecting of a lottery insurance (h). And in an action against a candidate at an election for bribery, an unstamped paper, purporting to be a promissory note, which had been given by the voter as a cloak for the bribe, is evidence to prove the fact of payment (i), or to confirm the testimony of a witness (k). But an unstamped agreement for letting a tenement is not evidence in a settlement * case to prove the value, for that is the essence of the contract (j). * 1383

In an action for money lent, the defendant was permitted to give a promissory note in evidence, although unstamped, given by him to the plaintiff, to prove that the latter had fraudulently procured him to write it when he was in a state of intoxication (l).

An unstamped receipt may be used by a witness who saw the money paid, to refresh his memory (m). An unstamped contract containing directions to an agent is evidence to prove those directions (n). And although an instrument be inadmissible in evidence for want of a stamp, yet the Court may look at it for collateral purposes, and to see how far it affects the reception of other evidence. If an unstamped contract relate to the sale and delivery of goods, and a contract be proved by parol only, the Court

(e) *R. v. Gilsen*, 1 Taunt. 95; *supra*, 68.

(f) Per Bayley, J. Lancaster sum. assizes, 1821. So in the case of a fraudulent conveyance. *Supra*, 153.

(g) So ruled by Abbott, L. C. J. Guild. sitt. after Mich. 1822.

(h) *Holland v. Duffin*, Peake's C. 58.

(i) *Dover v. Maestaer*, 5 Esp. C. 93.

(k) *Ibid*.

(j) *R. v. Castlemorton*, 3 B. & A. 588.

(l) *Gregory v. Fraser*, 3 Camp. 454.

(m) *Rambert v. Cohen*, 4 Esp. C. 213; *Jacob v. Lindsay*, 1 East, 460.

(n) *Hedge's case*, 28 Howell's St. Tr. 1344.

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IV.

Collateral
purposes.

will look at the instrument to see whether it applies to the goods then sought to be recovered upon (o). So, justices at sessions may look at an unstamped agreement relating to an expired hiring and service, to see when it ceased to operate, in order to guide them in receiving or rejecting parol evidence to prove a subsequent hiring and service (p).

SURETY.

Action against
principal.

* 1384

Actual pay-
ment of
money.

In an action by a surety against a principal for money paid on account of the latter, the plaintiff must prove the original obligation by proof of the bond, agreement, or other instrument by which he became * surety. And unless the fact appear from the instrument itself as executed by the defendant, proof must be given that the plaintiff became a party at the instance of the defendant in the character of surety (1). In the next place he must prove, that he was called upon to pay the money, and that he paid it after notice given to the defendant, or that the latter has refused to pay the money. If he has been compelled to pay by legal process it should be proved in the usual way; and if the money has been levied by execution, a copy of the judgment and writ should be proved. The surety cannot support the action for money paid if he has merely given a security for payment (q) (2). He must

(o) Per Bayley, J. 15 East, 455.

(p) *R. v. Inhabitants of Pendleton*, 15 East, 449.

(q) *Taylor v. Higgins*, 3 East, 169; *supra*, 99, 100. An allegation of the payment of money recovered is satisfied by proof of payment and production of the *postea*; no judgment having been entered up. *Harrop v. Bradshaw*, 9 Price, 358.

(1) [In *Hunt v. United States*, 1 Gallison, 33, a query is made, whether a party can, as to the obligee, aver himself to be a surety, unless his character appear on the bond. But in an action against a co-surety to compel contribution, the defendant may show that the plaintiff, though apparently a surety, was in fact the real debtor. *Taylor v. Savage*, 12 Mass. Rep. 102.

It is not sufficient to found a presumption of one of several obligors in a bond being the principal, that he signed his name first. *Doughty v. Bacot*, 2 Desauss. 550. *Elliott v. Lyell*, 3 Call, 268. But the circumstance of one obligor's making payments and being resorted to by the creditor, raises strong presumption that he was principal; while the circumstance of another obligor's not making payments, and not being called on for them, raises a presumption that he was surety. 2 Desauss. *ubi sup.* If the condition of the bond extend to all the obligors, and not to the first named singly, it is a circumstance tending to show that the one first named is not the principal obligor. Per Roane, J. 3 Call, *ubi sup.*]

(2) [See *Powell v. Smith*, cited Vol. II. p. 101, note (1), and

prove actual payment by the testimony of the agent who paid it, or the party who received it. The mere acknowledgment by the latter that he has received the money will not be sufficient (r).

One who has been bail for the defendant may recover the expenses to which he has been put in taking him, as money paid to his use ; but he cannot recover the costs of a suit brought by an agent against himself to recover those expenses, which suit he has unnecessarily defended (s) (3).

A surety in an action against a co-surety (4), must in like manner prove their obligation as co-sureties, his application to the defendant to pay his share, and the Action against a co-surety.

(r) *Dunn v. See*, Holt's C. 339; where, in an action by one co-surety against another, the evidence of the principal to prove that one of the creditors had admitted payment of the debt was rejected by Park, J.; and the Court of C. B., after a verdict for the plaintiff, refused a rule nisi for a new trial. *Supra*, 48; *infra*, 1386, 7.

(s) *Fisher v. Fallows*, 5 Esp. C. 171.

Pigou v. French, Circuit Court, April, 1805, Wharton's Digest, 572, 3. A surety, who gives the obligee a new bond with surety, and a warrant of attorney on which judgment is entered up, but no money paid, cannot recover against the principal, in an action on the common money counts. *Morrison v. Berkey*, 7 Serg. & Rawle, 238. See *Bachelder v. Fiske & al.*, 17 Mass. Rep. 464. But where one signed a promissory note as surety, on which note a judgment was recovered, and afterwards gave to the plaintiff his negotiable note expressly as a satisfaction of the judgment, and which operated as an extinguishment of the judgment-debt; it was held that he might maintain an action for money paid against his principal, although there had been no satisfaction entered of record, and the note still remained unpaid. *Witherby v. Mann & al.*, 11 Johns. 518.]

(3) [Without an express stipulation, a surety, who pays the debt of his principal, can only require his money to be refunded to him with interest, although he may have suffered by the sacrifice of his property to pay the debt. *Vance v. Lancaster*, 1 Hayw. Tenn. Rep. 130. And where the principal gave the surety a written promise "to hold him harmless from any loss he might sustain by signing said bond," it was held, in a suit on that promise, that the surety could recover only the amount which he had paid on account of the debt, with such reasonable expenses as he might have been obliged to incur, and not such extraordinary and remote expenses as might have been avoided by paying the debt. *Hayden v. Cabot*, 17 Mass. Rep. 169.]

(4) [In North Carolina, an action at law could not formerly be maintained by one joint surety, who had paid the whole debt, against the other for a moiety, without an express promise; but equity only could give relief. *Carrington v. Carson*, Cam. & Nor. 216. A statute has since given jurisdiction, in such case, to the courts of law; but it is held that the court of equity still retains jurisdiction, notwithstanding the statutory provision. *Shepherd v. Monroe*, 2 Car. Law Repos. 624.]

PART
IV.Action against
a co-surety.

* 1385

payment by himself(5). It has been said that the record of the judgment against several co-defendants in *assumpsit* will be evidence for one upon whom the whole * of the damages has been levied, to obtain contribution from the rest (t).

If two co-sureties join in such action, either against the principal or against a third co-surety, it will be incumbent on them to prove that they paid the money out of a joint fund; for if each pays money out of his own private funds, they cannot maintain a joint action (u).

In an action by one assignee under a commission of bankrupt, who has been compelled to pay the charges of the messenger under the commission, against another assignee, it is not necessary to prove that the defendant has in his hands any funds from the bankrupt's estate (x).

Surety for a
bankrupt.

* 1386

By the statute 49 Geo. III. c. 121, s. 8, where, at the time of issuing the commission (y), any person shall be surety for (z), or be liable for any debt (a), of the * bank-

(t) *Supra*, 102; 2 N. R. 371.

(u) *Osborne v. Harper*, 5 East, 225; where, after a dissolution of partnership, one of three partners drew a bill in the name of the firm, which the other two were obliged to pay; and a joint action by them against the former was held to be maintainable, because they had jointly borrowed money to pay the bill, and had given their joint note for it. Where two sureties have been compelled to pay money for their principal each should bring a separate action against the principal for the money which he has personally paid (*Brand v. Boulcott*, 3 B. & P. 235); or against each of the other sureties for contribution. *Cowell v. Edwards*, 2 B. & P. 268.

(x) *Hart v. Riggs*, Holt's C. 245.

(y) The stat. does not apply to any debt which accrues after the issuing of the commission. *Maddougal v. Paton*, 2 Moore, 644. [8 Taunt. 584, 8. C.]

(z) Bail above are not sureties within the statute. *Newington v. Keays*, 4 B. & A. 493.

(a) This word does not extend to the value of an annuity paid by

(5) [One surety on an administration bond cannot bring an action against the co-surety for an alleged default in the administrator, before he has been damnified in his character of surety. *The People v. Duncan*, 1 Johns. 311. A court of chancery will not compel a surety to contribute to the relief of his co-surety who has been compelled to pay the debt, unless it appear that due diligence was used, without effect, to obtain reimbursement from the principal, or that he was insolvent. *McCormack's Adm'or v. Obannon's Ex'or*, &c., 3 Munf. 484. Where one surety has paid the debt of the principal after the death of his co-surety, he may recover against the representatives of the latter. *Bachelder v. Fiske & al.*, 17 Mass. Rep. 464. See *Taylor v. Savage*, and *Skilkin v. Merrill*, cited Vol. II. 102, note (2), and *Turner v. Davies*, 2 Esp. C. 478. See also *Hassinger v. Solms*, 5 Serg. & Rawle, 8.]

rupt, it shall be lawful for such surety, if he shall have paid the debt, or any part thereof in discharge of the whole debt (b), although he may have paid the same after the commission shall have issued, and the creditor shall have proved his debt under the commission, to stand in the place of the creditor as to dividends, upon such proof; and where the creditor shall not have proved under the commission, it shall be lawful for such surety, or person liable, to prove his demand in respect of such payment under the commission.

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Surety for a
bankrupt.

The law implies a promise of indemnity in all cases where several are jointly liable to another upon a contract. But the law implies no promise where the liability arises *ex maleficio* (c) (1); and therefore will not enforce even an express promise to indemnify, where money is knowingly advanced in furtherance of an illegal purpose (d).

In an action against a surety to recover the debt of the principal, it is, as has already been seen, necessary to prove a promise in writing (e) (2). The declaration or admission

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the surety after the bankruptcy (*Flanagan v. Watkins*, 3 B. & A. 186.) A discharge by a certificate from the debt discharges the bankrupt also from all consequential damages; and therefore the acceptor of a bill for the accommodation of the drawer cannot, after the bankruptcy, and certificate of the latter, maintain an action against him for not providing him with funds, whereby he had incurred the costs of an action, and had been obliged to sell an estate to raise money to pay the bills. *Vansandau v. Corsbie*, 3 B. & A. 13; [8 Taunt. 550;] 2 Moore, 602. *Brind v. Bacon*, 5 Taunt. 183.

(b) A payment of part merely in discharge of the surety's personal liability is not within this clause. *Soutten v. Soutten*, 5 B. & A. 852.

(c) *Merryweather v. Nizan*, 8 T. R. 186. [1 Camp. 345. 2 Camp. 452.]

(d) *Cannan v. Bryce*, 3 B. & A. 179; *supra*, 105.

(e) *Supra*, 593. Proof of a demand is unnecessary, for a surety is bound to inquire whether his principal has paid or not. *Atkinson v. Carter*, 2 Chitty's R. 403. [See also *Williams v. Greer*, 2 Hayw. (Tenn.) Rep. 240.]

The obligation to contribute exists although the sureties are

(1) [*Dupuy v. Johnson*, 1 Bibb, 562. *Thweatt v. Jones*, 1 Randolph, 328. *Wilford & al. v. Grant, Kirby*, 114. *Acc.* It seems that a court of chancery will not sustain a bill for contribution between joint trespassers, especially where there is not equal equity between them. *Peck v. Ellis*, 2 Johns. Ch. Rep. 131.]

(2) [The law will not raise an implied assumpsit against a surety in favour of a stranger who has paid the debt of the principal. *Toder v. Briggs*, 3 Bibb, 208. See Vol. II. 101, 102, & notes.]

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of the principal is not, it seems, evidence to prove the debt to be due from the principal to the plaintiff, for the principal himself may be called (f) (3).

If *A.* guarantees the payment of such goods as *B.* shall deliver to *C.*, the declaration of *C.* of his having had goods is not admissible to prove the fact against **A.* (g); for the engagement is to pay for such goods as shall be delivered, not for such as *C.* shall acknowledge to have received; the defendant has a right, therefore, to have the delivery proved. Besides this, the evidence is not the best that the case admits, and to receive it would be to open a door to collusion (h). Neither are the subsequent declarations of the principal admissible to prove the terms of the original contract (i).

So, on the execution of a writ of inquiry on an indemnity-bond, admissions by the principal as to the amount of the damage are inadmissible (k).

And in an action against a co-surety on a bond for contribution, a declaration by one of the obligees, after the payment of part of the money by the principal obligor, that it had been received on account of the bond, is not admissible evidence for the defendant (l), although such a declaration made at the time of payment seems to be admissible as part of the *res gestæ* (m).

constituted by different instruments; per Eldon, C. in *Mayhew v. Crickett*; 1 Wils. C. R. 424. Where the grantee of an annuity gave time to the principal it was held that a surety was discharged in equity. Per Lord Eldon, 2 B. & P. 62. 2 Ves. Jun. 340. 2 Atk. 91. But it is no defence to a surety either at law, or in equity, that time has been given to the obligor of a bond, unless some injury has been sustained. *Prendergast v. Davey*, 6 Mad. 124.

(f) *Supra*, Vol. I. p. 308, & sequent.

(g) *Evans v. Beattie*, 5 Esp. C. 26.

(h) See Lord Ellenborough's observations, 5 Esp. C. 26.

(i) *Bacon v. Chesney*, 1 Starkie's C. 192.

(k) *Cutler v. Newlin*, Cor. Holroyd, J. Winch. Spring Ass. 1819. Manning's Index, 137.

(l) *Dunn v. Slee*, Holt's C. 399.

(m) *Ibid.* see tit. *Payment*.

(3) [In an action on a bond against the administrator of a surety, a judgment on an award against the principal, in a former action brought by the plaintiff against him, was held not to be evidence. *Beall v. Beck*, 3 Har. & M'Hen. 242. So the record of a verdict and judgment, in an action on a recognizance against the principal, is not evidence against the surety. *Respublica v. Davis*, 3 Yeates, 128. See also *Dawes, Judge, v. Shed & al.* 15 Mass. Rep. 6.]

It is otherwise where the principal himself is the real defendant in the action: as, where the sheriff brings an action against a surety for his bailiff, who is the real defendant in the action (n), having indemnified the surety.

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But although the declarations, or entries of the principal, whilst living, cannot be admitted against the * surety, it is a very different question whether such evidence may not be admissible after the death of the party.

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In the late case of *Goss v. Wallington* (o), the action was on a bond given by the defendant as surety for a collector of taxes, then deceased; the condition was, that Watts, the principal, should collect all duties, should render an account of such collection to the plaintiff, and deliver up to him all books and accounts intrusted to his care. The alleged breach was, that Watts had received 100*l.*, but had not paid it over when required. On a writ of inquiry, after judgment by default, the plaintiff produced the books of Watts, which had been handed over by him to his successor in office, containing the names of parishioners, the sums with which they had been charged, with marks at the side to indicate payment. Receipts, signed by Watts, for sums received by him in his official character, were also produced. The plaintiff had a verdict for the whole of the claim, subject to reduction, in case the Court should be of opinion that this evidence was inadmissible. The Court decided professedly upon a very narrow ground, viz. that the entries in the book were admissible as being entries in a public book, especially as the due delivery of such books was part of the condition of the bond. But the Court is stated to have held that there was not enough in the circumstances of the case to admit the receipts of Watts against his surety (p).

(n) *Perchard v. Tindall*, 1 Esp. C. 394. Note, that it does not appear that in this case any evidence was given to show that the defendant was indemnified by the bailiff. *Vide supra*, 41; and see *Dike v. Aldridge*, cited 11 East, 584, n.

(o) 3 B. & B. 132.

(p) It is, however, to be observed, that it was unnecessary to decide the question as to the receipts, and that no evidence was given of the death of the parties who paid the money; and, with great deference to the opinion of the Court, it may be submitted whether private entries thus made by a collector do not, after the death of the collector, and of the party who paid the money, fall within the general rule as to entries made by a receiver against his own interest. The admissibility of such evidence in general rests upon the improbability that a receiver would, against his own interest, make a false entry of a fact peculiarly within his knowledge; a principle which seems to be as applicable to the case of a collec-

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surety.

* In general, giving time to the principal "affords no defence to an action against the surety, where he is bound by a specialty (q). But this seems to be founded * on the mere technical consideration of the nature of the instrument (r).

Where the guarantee is not under seal, there is no technical rule which restrains a court of law from doing justice; still less is there any which constrains the Court to compel payment by a surety who, in justice and equity, has been discharged by the conduct of the creditor (1).

tor as to that of any other receiver. And it is very difficult to say that the same principle does not apply to the case of receipts, even more forcibly than to entries in a private book; for the collector, by delivering the receipt to the party interested, at once openly avows his receipt of the money, charges himself, and discharges the party liable. The admissibility of such evidence rests, therefore, on the great improbability that the collector has given a false receipt, to his own obvious and immediate detriment, and that both he and the party to whom the receipt was given were parties to an enormous fraud, for the remote prospect of injuring the surety after the collector's decease. *Vide* Vol. I. p. 308.

(q) It is no defence at law to an action on a bond against a surety, that the obligor, by a parol agreement, has given time to the principal (*Dacey v. Prendergrass*, 5 B. & A. 187). But that case seems to have been decided on the ground that an obligation by an instrument under seal could not be discharged by parol. The same point was decided in *Bulleet v. Jarrold* (cited *ibid.*) in the Exchequer (8 Price, 467) and in the House of Lords. (And see *The Trent Navigation Company v. Harley*, 10 East, 34; *supra*, 650.) But where a guarantee for the payment of a debt is not under seal, it seems that there is no strict technical rule which prevents a court of justice from looking to the real justice of the case. See the observations of Abbott, C. J. in *Dacey v. Prendergrass*, 5 B. & A. 187. And see *Murray v. King*, 5 B. & A. 165; *Bulleet v. Jarrold*, 8 Price, 467; *Peel v. Tatlock*, 1 B. & P. 419.

It has been seen, that in the case of bills of exchange the giving time to the acceptor, without the assent of the drawer, will usually discharge the latter. *Supra*, 289.

The cases of bail and replevin-bonds are provided for by the statutes which give the Courts jurisdiction over them. 5 B. & A. 192. See further, *Bank of Ireland v. Beresford*, 5 Dow, 234. *Boulbee v. Stubbs*, 18 Ves. 20. *Hamilton v. Stratton*, Cor. Abbott, C. J. Sitt. Westm. July 9th, 1819, Mann. Index, 284.

Sureties in a replevin-bond are not discharged by giving time to the plaintiff. *Moore v. Bowmaker*, 6 Taunt. 379. [2 Marsh. 81. S. C.]

(r) See the last note.

(1) [The indulgence granted to a principal, which will discharge a surety from his engagement, must be of that kind by which the nature of the contract is changed, or whereby the creditor without

It has been held that an agreement between the creditor and one co-surety, by which the former gives time

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the consent of the surety, and by his own act, puts it out of his own power to enforce payment of the debt by the principal: It does not mean a mere forbearance to sue the principal, which a court of equity, on application of the surety, might direct him to do on pain of foregoing his claim against the surety. *Buchanan v. Bordley*, 4 Har. & M'Hen. 41. That a surety is not discharged by a mere delay to demand payment of the principal after it becomes due, unaccompanied by fraud or an express agreement with the principal to allow the delay—see *Hunt v. United States*, 1 Gallison, 32. *Burn v. Ponug*, 3 Desaus. 604. *Dehuff v. Turbett & al.* 3 Yeates, 157. *Thursby v. Gray*, 4 Yeates, 518. *Cope v. Smith*, 8 Serg. & Rawle, 110. *Simpson's Case*, cited 6 Binney, 300. *Commonwealth v. Wolbert*, 6 Binney, 292. *The People v. Jansen & al.* 7 Johns. 332. *Fulton v. Matthews & al.* 15 Johns. 433. *Powell v. Waters*, 17 Johns. 176. *Twinsend v. Riddle*, 2 New Hamp. Rep. 448. *Hunt v. Bridgham & al.* 2 Pick. 581. *Orme v. Young*, Holt's N. P. Rep. 87. The only semblance of authority for a contrary doctrine is *Saunders v. Smith & Churchill*, Tothill, 180, (ed. of 1820) in these words—"A surety relieved here where a bond is contained in use without his privity, he thinking the same to be paid."

In *Pain v. Packard*, 13 Johns. 174, it was decided, that if the surety on a promissory note, request the creditor to collect the money from the principal, and he neglect so to do, and the principal afterwards becomes insolvent, the surety is discharged. This doctrine was denied by Kent, Chancellor, in 2 Johns. Ch. Rep. 554, and was affirmed in the Supreme Court of Errors, in New York, by the casting vote of the lieutenant governor, against the opinion of a majority of the judges—Yates & Platt, Js. retracting the opinion which they concurred in, in the case of *Pain v. Packard*. *King v. Baldwin*, 17 Johns. 384. This doctrine is also questioned by the courts of New Hampshire and Massachusetts. 2 New Hamp. Rep. 451—2 Pick. 614. And in New Jersey, a directly contrary decision has been made, in the case of a sealed instrument. *Manning v. Shotwell*, 2 Southard's Rep. 585. Southard, J. *dissenting*. In Virginia, before the statute of 1794, a surety in a bond was not absolved from the obligation, by requesting the obligee to sue, and his failing to do so, without anything active between him and the principal, tending to show a new contract of forbearance. In such a case, the surety might have paid the money, taken an assignment of the bond, and sued the principal himself; or he might have brought his bill *quia timet* to compel the principal to pay and the creditor to receive the money. *Croughton v. Duval*, 3 Call, 69. In *Cope v. Smith*, 8 Serg. & Rawle, 110, the Supreme Court of Pennsylvania decided—on the ground that there was no court of chancery in that state—that if a creditor, after being requested to bring suit against the principal debtor on a bond, refuse to do so, the surety is discharged; provided the request be proved clearly and beyond all doubt; and provided it be positive and accompanied with a declaration that unless the request be complied with, the surety will be considered as discharged: Such request ought to be in writing, but it is not void though not in writing. See also

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for payment, made without the privity of another co-surety, will not discharge the latter (r). Neither the

(r) *Dunn v. Slec*, 1 Holt's C. 399.

Eddowes v. Neill, 4 Dallas, 134. See *Rutledge v. Greenwood*, cited in the next paragraph.

The rule, as recognized in the Circuit Court of the United States, is—that if a creditor, without the knowledge and consent of the surety, expressly or tacitly yielded, give time to the principal, by enlarging the credit beyond the period mentioned in the contract, the surety is discharged both in equity and law. *United States v. Hillegas's Executors*, Wharton's Digest, 572. If the obligee undertakes to discharge the principal, or in any considerable degree to lessen his responsibility, without consulting the surety, the latter will be discharged: But where the obligee, after bringing covenant against the principal, and demanding bail, accepted a common appearance, on his assigning all his property—in consequence of which the principal left the State—it was held that the surety was not discharged. *Commissioners of Berks v. Ross*, 3 Binney, 520. To release the surety, there must be a new agreement, varying the terms of the contract, and extending the time of payment: A demand by the surety to sue the principal will not release the surety, if the creditor offers to sue all the obligors, but the surety declines it. *Rutledge v. Greenwood*, 2 Desausse, 389. Where the obligee took additional and collateral security from the principal, and even prolonged the time of payment for the additional security, it was held that the surety was not discharged. *Shubrick's Executor v. Russel*, 1 Desausse, 315. In an action by a sheriff against the sureties in a bond conditioned that the principal shall faithfully perform the duties of a deputy sheriff, and shall save the obligee harmless from all suits, costs, &c. occasioned by such deputy's misconduct, it is not a good plea, that before the breach of the condition of the bond, they gave the obligee notice of the deputy's unfitness for office, on account of intemperance, negligence, &c. and requested his removal, and expressed their unwillingness to be any longer accountable for the deputy's official conduct. *Orane v. Newell & al.* 2 Pick. 612. Where the plaintiff obtained judgment against the principal, and issued execution, which was returned *nulla bona*, but under circumstances which were supposed to make the officer liable for the debt, and afterwards brought an action against the surety, on his agreement to become responsible—it was held that the proceedings of the officer, whereby he rendered himself liable, were no defence, and that the plaintiff having proceeded against the principal to judgment and execution, without effect, was not bound to go further, and prosecute the officer for his supposed liability. *Leonard v. Giddings*, 9 Johns. 355.

Where the nature of legal proceedings affords an opportunity of presenting the question, the same rule, as to what will discharge a surety, prevails as well in law as in equity. *The People v. Jansen & al.* 7 Johns. 332. If the obligee extend the period of credit to the principal obligor longer than the parties contracted for in the first instance, against the consent of the surety, the latter will be discharged: But it must be made clearly to appear that such credit was given, either expressly or impliedly, against the surety's consent. *Butler v. Hamilton*, 2 Desausse, 296. See also *Ludlow v.*

principal nor the surety is a competent witness for the other (s).

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(s) *Supra*, 139. 786. See *Townsend v. Downing*, 14 East, 565; where it was held that an uncertificated bankrupt was not competent to prove payment in an action against his surety, on a bond at the suit of a creditor who had elected to prove his debt under the commission under the statute.

Simond, 2 Caines Cas. in Er. 1. Where the creditor agreed with the principal debtor to wait one year for a moiety of his debt, without the knowledge or consent of the surety, it was held that the latter was discharged. *Hill v. Bull*, Gilmer, 149. A stay of execution by a creditor, after a levy upon the property of the principal, without the privity or consent of the sureties, will operate to release them. *Jones v. Bullock*, 2 Bibb, 467. See also *Rathbone & al. v. Warren*, 10 Johns. 587. If property be taken on a writ of *feri facias*, and restored to the defendant by order of the plaintiff, without the consent of the defendant's surety, no new execution can be issued, on the judgment, against the surety. *Baird v. Rice*, 1 Call, 18. Where the creditor has the means of satisfaction in his hands, and does not choose to retain it, but suffers it to pass into the hands of the principal, the surety is discharged. *Commonwealth v. Vanderslice & al.* 8 Serg. & Rawle, 452. It seems, that where during the pendency of a suit, the creditor, on receiving a confession of judgment by the principal, enters into a covenant to stay execution for a given time, the surety is thereby discharged, in equity. *Ward v. Johnson*, 6 Munf. 9. Cabell, J. *semb. contra*. See 1 Munf. 45. Wherever a creditor, by an arrangement with the principal, without the privity or consent of the surety, changes a material part of the contract, by which the risk of the surety is increased—as where he has been induced, by reason of such arrangement, to yield an indemnity given him by his principal—the surety is thereby discharged. *Craig v. Cox*, 2 Bibb, 309. In an action brought against a surety on a bond given for the faithful discharge of the duty of a loan-officer, under a statute of New York, it was held that the surety might set up in his defence the *laches* of the supervisors in not discharging and prosecuting the loan-officer for his first default, but suffering him to continue, after repeated defaults, for more than ten years, when he became insolvent, and without prosecuting the officer as required by the statute: And where no notice was taken of the defaults of the principal until after the death of the surety, this *laches* of the supervisors was held to be a good defence, especially in a suit against the surety's heirs. *The People v. Jansen & al.* 7 Johns. 332. In *United States v. Kirkpatrick & al.* 9 Wheat. 737, Story, J. says the Supreme Court of the United States are not prepared to yield to the authority of the case of *The People v. Jansen & al.*, and that *laches* not being, in general, imputable to government, a mere omission to bring a suit, upon the neglect of an officer or agent to account, where the laws require a periodical account and settlement, will not discharge his sureties. See 6 Binney, 292. In an action against the sureties of the commissioners for loaning money of a county, for the default of their principals in not paying over money which they had received for interest, it was held that the sureties were not exonerated by the negligence of the comptroller in not calling on their principals after

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TENDER.

Proof of.

If the defendant plead a tender (*t*), which the plaintiff denies, the debt stands admitted, and proof of the tender is incumbent on the defendant.

If the general issue be pleaded as to part of the demand, and a tender as to the residue, it will be incumbent on the plaintiff to prove that the defendant was indebted in a larger sum than that admitted by the plea of tender. If he fail in that proof, the only question will be as to the tender, which admits the debt *pro tanto*.

(*t*) The defendant, on pleading a tender, pays the money into court (*MacLellan v. Howard*, 4 T. R. 194; *Jenkins v. Edwards*, 5 T. R. 97); and as he admits the debt *pro tanto*, he cannot plead the general issue as to that part of the demand.

numerous defaults, unless an injury resulted to them from his negligence. *The People v. Berner, & al.* 13 Johns. 383. (It did not appear, in this case, that the principals were insolvent, or unable to indemnify the sureties.) Where a surety became bound, supposing himself responsible for the debt of a partnership, and it afterwards appeared that not the partnership, but only the individual partner, was liable—the surety was held to be discharged. *Livingston v. Hastie & al.* 2 Caines' Rep. 246. See *McCormack's Administrator v. Obannon's Executor, &c.* cited *supra*, p. 1384, note (5).

A surety, who apprehends danger from the creditor's delay, may compel him to sue the principal debtor, on giving him an indemnity against the consequences of risk, expenses, &c. *Hayes v. Ward*, 4 Johns. Ch. Rep. 131. See also *King v. Baldwin*, 2 Johns. Ch. Rep. 559. 8 Serg. & Rawle, 114. Where a creditor held a bond and mortgage taken in New Jersey, where all the parties resided, as security for a note indorsed by the plaintiff, and transferred by A. to the creditor on a usurious loan, and instead of resorting to the mortgage of the principal debtor, sued the plaintiff, while in New York, as indorser, chancery granted an injunction to stay the suit at law until the creditor had pursued his remedy on the mortgage. 4 Johns. Ch. Rep. *ubi sup.* A surety may apply to the court of chancery for relief and protection as soon as he is endangered, and need not wait until he has paid the debt. *Taylor v. Heriot*, 4 Desauss. 227. Whether a creditor can be compelled in equity to resort in the first instance to the principal debtor, before he can sue the surety—*dubitatur*. 4 Johns. Ch. Rep. *ubi sup.* In *Shubrick's Executor v. Russel*, 1 Desauss. 315, it is said to be a mistaken notion that a surety is not liable for the debt until measures are taken to recover it from the principal. To prevent circuity of action and attain the ends of justice, a court of equity will completely indemnify one of the sureties in a bond, by means of a lien on the property of the principal obligor existing in favour of the other surety; although he has himself relinquished a lien on the same property, originally created for his indemnification: And for this purpose, the court will compel the creditor (all parties interested being before it) to resort to that property in the first place for satisfaction of his debt. *West v. Belches*, 5 Munf. 187. See also *Groves v. Graves*, 1 Wash. 1. *Humphrey's Administrator v. McClenahan's Administrator*. 1 Munf. 493.]

In order to constitute a legal tender, it is essential to prove an *actual offer* of the sum due, unless the *actual production and offer of the money be dispensed with by the express declaration of the creditor that he will not accept it, or by some equivalent act (u).

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Proof of.

If the plaintiff do not object to receive the money, it is not sufficient for the defendant to show that he had the money with him, and held it in a bag under his arm; he ought to have laid it down for him (x).

A legal tender must also be of *money*, and not of bank notes (y), or bills (z) (1).

(u) See [*Sheredine v. Gaul*, 2 Dallas, 190. *Searight v. Calbraith*, 4 Dallas, 325.] *Thomas v. Evans*, 10 East, 101; *infra*, 1394; and *Dickenson v. Shee*, 4 Esp. C. 68, Cor. Lord Kenyon, cited by Bayley, J. in the former case. There the defendant went to the plaintiff's attorney, saying that he was come to settle with him on the plaintiff's account, and produced a paper containing the statement of the account, in which he made the balance 5*l.* 5*s.*, which, he said, he was ready to pay, but produced no money or notes. The plaintiff's attorney said he could not take that sum, as his client's demand was about 8*l.* And this was held to be no tender; for there should have been an offer to pay by actually producing the money, unless the plaintiff dispensed with the tender expressly, by saying that the defendant need not produce the money, as he would not accept it. But see *Glascott v. Day* (5 Esp. C. 48); where Lord Ellenborough seems to have been of opinion, that if the defendant had the money ready for immediate delivery, a declaration by the plaintiff that he would not receive it on account of insufficiency, would dispense with the actual production and offer. In that case, however, the tender was held to be insufficient, the defendant not having the money ready.

(x) B. N. P. 151. Where the defendant threw a guinea and some bank notes on a table, saying to the plaintiff, "There is the balance of the account," and the plaintiff refused to take up the money, and went away, and the money was counted over by the witness, and found to amount to 17*l.* 1*s.*, it was held to be a sufficient tender of that sum. *Holland v. Phillips*, 6 Esp. C. 46.

(y) But a tender in bank notes, it has been held, is good, unless it be specially objected to. *Wright v. Reed*, 3 T. R. 554; 2 B. & P. 526. See 51 Geo. III. c. 127, s. 3; 52 Geo. III. c. 50, s. 6, as to the tender of bank notes by tenants in case of distress for rent. [See *Place v. Lyon*, Kirby, 405.]

(z) It is said to have been held that a tender in a bill of exchange of a provincial bank is good, if unobjected to; but in a later case such a tender was held to be insufficient, although no objection was made. *Mills v. Safford*, Peake's C. 180, n. Ex. Easter T. 1808. But see below, 1393.

(1) [If, before the day of payment, the party to whom payment is to be made agree to accept bank bills, it is a waiver of a tender in gold and silver, and the bank bills having been tendered, it is competent evidence to support an allegation of tender. *Warren v.*

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Proof of.

* A tender of a larger sum than is due is a legal tender; for the creditor ought to accept so much of it as is due to him (a).

A tender to *A.* of a sum including both a debt due to *A.* *B.* and *C.* and also a debt due to *C.*, is a good tender of the debt due to the three (b).

And if several creditors to whom money is due in the same right, assemble for the purpose of demanding payment, a tender of the gross sum, which they all refuse on account of the insufficiency of the amount, is good (c). But a tender of a larger sum, requiring change, is insufficient (d).

A plea of tender of half a year's rent is not supported by evidence of a tender of the half-year's rent, requiring the lessor to get change, and pay the property-tax (e). The offer of the money must, it seems, be an absolute and unconditional one in payment of the debt. Where the defendant offered to pay the money as a boon, but accompanied the offer with a protestation against the right of the party to receive it, the tender was held to be insufficient (f).

(a) *Wade's case*, 5 Rep. 114; *Noy's R.* 74. *Quando plus fit quam feri debet, videtur etiam illud fieri quod faciendum est. Et in maiore summa continetur minor.* See also *Douglas v. Patrick*, 3 T. R. 683. But see *Watkins v. Robb*, 2 Esp. C. 711.

(b) *Douglas v. Patrick*, 3 T. R. 683.

(c) *Black v. Smith*, Peake's C. 88. See 2 T. R. 414; and *Dame Gresham's case*, Moore, 201, 2; 1st point.

(d) *Robinson v. Cook*, 6 Taunt. 336. A tender of a 5*l.* note, demanding 6*d.* in change, is not, it seems, a good tender of 4*l.* 19*s.* 6*d.* *Watkins v. Robb*, 2 Esp. C. 711. S. P. *Betterbee v. Davis*, 3 Camp. 70. Where the debtor tendered seven sovereigns in payment of a debt of 6*l.* 17*s.* 6*d.* making a counter demand in writing, and saying, take your demand, the tender was held to be insufficient. *Brady v. Jones*, 2 D. & R. 305.

(e) *Ibid.*

(f) *Simmons v. Wilmott and others*, 3 Esp. C. 91, Cor. Eldon, C. J.

Mains, 7 Johns. 476. Treasury notes, issued under the Act of Congress of 1814, being by their terms receivable in payment of duties, taxes, and land debts, due to the U. States, for the principal and interest due thereon, were a good tender and might be pleaded as such to such debts. *Thorndike v. United States*, 2 Mason's Rep. 1. But the tender of notes of a bank, even for a debt due to the bank, will not avail the debtor. *Hallowell & Augusta Bank v. Howard & al.* 13 Mass. Rep. 235.

As to tender of bills of credit, and other paper money, in the different States, under former statutes, &c. see *Dunlop v. Funk*, 3 Har. & M'Hen. 318. *Quynn v. Whetcroft*, *ibid.* 352—*Williamson v. Bacot*, 1 Bay, 62—*Downman v. Downman's Ex'rs.* 1 Wash. 26. *Warders v. Arell*, 2 Wash. 282. *Skipwith v. Morton & Co.* 2 Call, 277—*Mumford v. Wright & al.* Kirby, 297.]

So a tender accompanied with the demand of a receipt in full (*g*), or under the condition that it shall be *received as the whole of the balance due (*h*), or that a particular document shall be given up to be cancelled (*i*), is insufficient.

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IV.

* 1393
Proof of.

But an informality in the tender will be cured by a refusal on the part of the plaintiff to receive the money; as, if the tender be of Bank of England notes (*k*), or even of provincial bank notes (*l*), and not of money; or although more than the precise sum be tendered, and change be demanded (*m*); or although on making the tender the defendant require a receipt to be given (*n*) (1).

Where the agent of the defendant pulled out his pocket-book, and offered to pay the whole sum to the plaintiff if he would go into a neighbouring public-house, and the plaintiff refused to take it, the tender was held to be good (*o*).

(*g*) *Glascott v. Day*, 5 Esp. C. 48, Cor. Ellenborough, C. J. *Huzham v. Smith*, 2 Camp. 21. But see *Cole v. Blake*, Peake's C. 179; where the tender was held to be good, although the defendant insisted on a receipt in full. But there the objection to the receiving the money was founded wholly on the insufficiency of the amount; and *qu.* whether this case was not decided on the ground of the general right of a debtor to demand a receipt on payment of money to his creditor, without adverting to the particular form of the receipt required. It has been said, that formerly such a right did not exist, except in cases of payment to the king's receiver. See *Bunb.* 348. But see *Fitz. Damage*, 75; *Bro. Ab. Taile d'Exchequer*, 7.

By the stat. 43 Geo. III. c. 126, s. 5, a debtor is empowered to tender a blank receipt at the time of payment, which the creditor is bound to fill up under a penalty of 10*l*.

(*h*) *Evans v. Judkins*, 4 Camp. 156, Cor. Gibbs, C. J. *Free v. Kington*, *Ibid.*

(*i*) *Huzham v. Smith*, 2 Camp. 21.

(*k*) *Wright v. Reed*, 3 T. R. 554; 2 B. & P. 526.

(*l*) *Lockyer v. Jones*, Peake's C. 3d edit. 239.

(*m*) *Black v. Smith*, Peake's C. 88.

(*n*) *Cole v. Blake*, Peake's C. 179. But see *Glascott v. Day*, 5 Esp. C. 48, *Huzham v. Smith*, 2 Camp. 21.

(*o*) *Read v. Goldring*, 2 M. & S. 86. Although the agent had

(1) [Where a defendant tendered a certain sum, and demanded a receipt in full of all demands, which the plaintiff refused to give, and thereupon the tender was withdrawn, it was held that the defendant had lost all benefit of the tender. *Thayer v. Brackett*, 12 Mass. Rep. 450. In *Eastland v. Longshorn*, 1 Nott & M'Cord, 194, it is held that a tender must be *unconditional*, and must always be of a definite and certain character.]

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IV.* 1394
Proof of.

But an actual production of the money is essential, unless the creditor dispense with it, either by an express * declaration, or by some equivalent act (1). Thus, where the debtor, on leaving home, left 10*l.* with his clerk for the plaintiff, and the plaintiff was informed of this when he called, and demanded a larger sum, and said that he would not receive any thing less than his whole demand, and the clerk did not offer the 10*l.*, it was held to be no tender (*p*).

To an agent.

A tender to an authorized agent is a tender to the principal (*q*). And a tender to an agent was held to be good, although the principal had previously prohibited the agent from receiving the money if offered, the principal having put the business into the hands of his attorney (*r*) (2).

To one of several creditors.

A tender to one of several joint-creditors is a tender to all (*s*). And if *A. B.* and *C.* have a joint, and *C.* a separate, demand on *D.*, and *D.* offers to pay both debts to *A.*, which *A.* refuses, without objecting that he is entitled on the joint demand only, it is a good tender of the debt to the three (*t*).

Time.

The tender, to be available, must have been made before the action was brought (*u*). Where the declaration

not been authorized to tender the whole, but tendered part at his own risk. *Ibid.* See also *Black v. Smith*, Peake's C. 88.

(*p*) *Thomas v. Evans*, 10 East, 101. *S. P. Dickenson v. Shee*, 4 Esp. C. 68, Cor. Lord Kenyon. And see *Douglas v. Patrick*, 3 T. R. 683.

(*q*) *Goodland v. Blewith*, 1 Camp. 477. But *semble*, that a bailiff who makes a distress cannot delegate his authority, and that a tender to his agent is insufficient. *Pimm v. Grevill*, 6 Esp. C. 95.

(*r*) *Moffat v. Parsons*, 5 Taunt. 307. [1 Marsh. 55 S. C.]

(*s*) *Douglas v. Patrick*, 3 T. R. 683. [*Warders v. Arell*, 2 Wash. 297.] So a request to one is a request to all who have jointly promised. *Brearton's case*, Noy, 135. Vin. Ab. Ev. T. b. 97.

(*t*) *Ibid.*

(*u*) [*Fishburne v. Sanders*, 1 Nott & M'Cord, 242.] It is no answer to a plea of tender before the exhibiting the plaintiff's bill, that the plaintiff had before the tender instructed an attorney to sue out the writ, and that he had applied before the tender for the

(1) [See *Blight v. Ashley & al.* 1 Peters' Rep. 24. *Slingerland v. Morse*, 8 Johns. 474. *Borden v. Borden*, 5 Mass. Rep. 67.]

(2) [If an indorser of a note receive notice, from an agent of the holder, (a notary public, for instance) of non-payment by the maker, and knows not at whose request the notice is given or who is the owner of the note, and he apply to such agent and offer the money and demand the note, and he cannot or will not receive the money and deliver the note; this, it seems, would be a good defence, on a plea of tender, in an action on the note by the holder. Per Parker, C. J. *Shed v. Brett*, 1 Pick. 406.]

was intitled generally of the term, it was held that the defendant could not give evidence of a tender made after the first day of the term, although he was able to show that the *latitat* was sued out after * the tender (x). This, however, appears to be doubtful; for as the plaintiff may, on proof of a *latitat* issued after the first day of term, give evidence of a cause of action arising after the commencement of the term, but before the suing out the *latitat*, notwithstanding the general memorandum, there seems to be no reason why the defendant should not also resort to the *latitat* to show that his tender was in time (y).

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If the plaintiff, to a plea of tender, reply a previous or subsequent demand and refusal (z), on which issue is join-

Subsequent demand.

writ, which was afterwards sued out. *Briggs v. Calverley*, 8 T. R. 629.

(x) *Rolfe v. Norden*, 4 Esp. C. 72. See *Southouse v. Allen*, Selw. N. P. 146; Tidd, 360. Note, that in *Rolfe v. Norden*, Le Blanc, J. said that he would admit the evidence of the *latitat*, reserving the point; but the defendant was not prepared with the writ, and the plaintiff had a verdict. Where the suing out a *latitat* is not replied to the Stat. of Limitations, or to avoid a tender, or given in evidence to support a penal action, it is considered but as process, and not as the commencement of the suit. *Foster v. Bonner*, Cowp. 454.

(y) See *Time*.

(z) [See *Rose & al. v. Brown*, Kirby, 293.] The defendant cannot plead a tender after the day of payment of a bill of exchange, although he aver that he was always ready to pay from the time of the tender, and that the sum tendered was the whole of the sum due in respect of principal and interest. *Hume v. Peploe*, 8 East, 168.—(1).

(1) [A tender is of no legal avail, if not made until after the stipulated time of payment has elapsed—even though the creditor had promised that he would take no advantage if the money were not paid at the time. *Frazier v. Cushman*, 12 Mass. Rep. 277. In strictness, a plea of tender is applicable only to those cases where the party pleading it has never been guilty of any breach of his contract. Per Lord Ellenborough, 8 East, 170. By the common law and practice of Connecticut, however, a tender of a debt is good, though the day of payment has elapsed. *Tracy v. Strong*, 2 Conn. Rep. 659.

Tender of payment before the money is due is of no avail, as the creditor is not bound to receive it before it is due by the terms of the contract. Per Parker, C. J. *Kingman v. Pierce*, 17 Mass. Rep. 247. See also Bac. Abr. Tender, D. *Jouett v. Wagnon*, 2 Bibb, 269. But in Maryland, it has been held, that where the condition of a bond is the payment of a certain sum of money at or upon a certain day, tender of payment before the day is good. *M'Hard v. Whetcroft*, 3 Har. & M'Hen. 85.]

PART
IV.Subsequent
demand, &c.

ed, the proof will lie on the plaintiff. He must prove a demand of the same sum; for after a tender of 5*l.*, the plaintiff cannot get rid of it by demanding a larger sum (a). The demand, to be available, must also have been made either by the plaintiff, or by an agent authorized to give a discharge for the money (b).

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* A demand made by the clerk of the plaintiff's attorney, who was an entire stranger to the defendant, was held to be insufficient (c). So was a subsequent demand, accompanied by a further demand of another sum which was not due (d).

After a tender made by A. and B., a subsequent refusal by A. alone, on a demand made upon him, enures as the refusal of both (e).

Proof of the delivery of a letter at the defendant's house to a clerk, who returned with an answer that the debt should be settled, was held to be *prima facie* evidence of a demand (f).

Original sued
out before
tender.

Upon a replication that before the tender the plaintiff sued out an original, it is sufficient to produce the *capias ad respondendum* (g).

To relieve
goods from
lien.

Where a tender is made to relieve goods from a claim of lien, the same degree of form and precision is not necessary as where it is made in discharge of a debt. In such a case it has been held to be unnecessary to tender the precise sum.

Although a tender of the sum due is not evidence under the general issue in *assumpsit* or debt, but must be specially pleaded, yet a tender of money due on a promissory note, accompanied with a demand of the note, is sufficient to stop the running of interest (i).

(a) *Spybey v. Hide*, 1 Camp. 181. And where issue was joined on a previous demand of 4*l.* 7*s.* 6*d.*, it was held that this was not supported by proof of a previous demand of 10*l.* 4*s.* then due on a bill of exchange. *Rivers v. Griffiths*, 5 B. & A. 630.

(b) 1 Camp. 478. *Coore v. Callaway*, 1 Esp. C. 115. See *Palliser v. Ord*, Bunb. 166.

(c) *Coles v. Bell*, 1 Camp. 478. n.

(d) *Coore v. Callaway*, 1 Esp. C. 115. *Strutt v. Rogers*, 7 Taunt. 213. [2 Marsh. 524. S. C.]

(e) *Hayward v. Hague*, 4 Esp. C. 93. And see 1 Esp. C. 349. *Pilkington v. Hastings*, 5 Co. 76; Cro. Eliz. 813.

(f) *Peirse v. Bowles and another*, 1 Starkie's C. 323.

(g) *Gosling v. Witherspoon*, 2 Will. Saund. 1, n. See *Time*.

(i) *Dent v. Dunn*, 3 Camp. 296. See *Hume v. Peploe*, 8 East, 168; 4 Leon. 209. [See *Dunlop v. Funk*, 3 Har. & M'Hen. 318.]

PART
IV.

Effect of.

* The effect of a plea of tender is to admit the ground of action, and facts as alleged. Where one count of the declaration alleged that the defendant agreed to pay 41l. for certain tithes let to him by the plaintiff, and that the plaintiff did let the tithes to him, and permit him to take them, it was held that the defendant, after having pleaded a tender to all the counts, was precluded from insisting that he had been interrupted in taking the tithes (*k*).

The acceptance of the sum tendered does not prejudice the right of the plaintiff to sue for more (*l*).

It has been held, that after a plea of tender the plaintiff cannot be nonsuited (*m*).

Where a party has wrongfully possessed himself of goods, no tender of freight is necessary in order enable the party to maintain his action (*n*). When necessary.

Where a tender and refusal are necessarily averred, the party must show an actual tender and refusal, or that every thing has been done on the part of the plaintiff which could be done to carry the contract into effect (*o*).

The plaintiff averred that he was ready and willing, and offered to transfer stock (*1*), but that the defendant would not accept it, but no proof was given of any *direct offer* made on the day appointed, or that the plaintiff had waited till the close of the transfer books * on that day for the defendant to appear and accept; after a verdict for the plaintiff; on a rule *nisi* to set it aside, the Court held that he ought to have shown a direct tender and refusal, or that he had done every thing in his power towards completing the * 1398

(*k*) *Cox v. Brain*, 3 Taunt. 95. So a plea of tender to a count on a promise to pay the debt of another in consideration of forbearance, dispenses with proof of an undertaking in writing. *Middleton v. Brewer*, Peake's C. 15.

(*l*) *Spybey v. Hide*, 1 Camp. 181. A defendant cannot plead *non est factum* in an action on a bond and tender as to part (*Jenkins v. Edwards*, 5 T. R. 97); or *non assumpsit* as to the whole, and tender as to part. *Macdellan v. Howard*, 4 T. R. 194.

(*m*) 2 H. B. 377. *Harding v. Spicer*, 1 Camp. 327; *sed qu*.

(*n*) *Lempriere v. Pasley*, 2 T. R. 485.

(*o*) 5 East, 107.

(1) [On the time, place, manner and effect of a tender of specific articles, see Chipman's *Law of Contracts for the Payment of Specific Articles*. *Aldrich v. Albee & al.*, 1 Greenleaf, 120. *Carley v. Vance*, 17 Mass. Rep. 389. *Barney v. Bliss & al.*, 1 Chip. Rep. 399. *Weld v. Hadley*, 1 N. Hamp. Rep. 295. *Avery v. Stewart*, 2 Conn. Rep. 69. *Savary v. Goe*, Circuit Court, April, 1812. Wharton's Digest, 576. *Newton v. Galbraith*, 5 Johns. 119. *Slingerland v. Morse*, 8 Johns. 473. *Coit v. Houston*, 3 Johns. Cas. 243.]

PART
IX.

contract, by staying at the bank as long as the transfer books remained open on the day appointed for the transfer (*p*). But where a tender on the part of the plaintiff would be nugatory on account of the defendant's inability to accept it, it need not be made (*q*).

In an action of *assumpsit* to recover money paid as part of the purchase-money of an estate, the title of the defendant being defective, it is not incumbent on the plaintiff to prove the tender of a conveyance; for the title being bad the tender would be nugatory (*r*).

TIME.

Computation
of time.

IN temporal proceedings, time is estimated by lunar, in ecclesiastical, by solar, months (*s*). The word *month*, as used in a statute, means a lunar month, unless from the express words, or from the context, it appear that a calendar month was intended (*t*) (1). In matters of private contract the word may be construed to mean either a lunar or calendar month, according to the intention of the parties (*u*). But if upon the face of the contract it stood indifferent which kind of month was meant, a lunar month would probably be understood, * in analogy to the con-

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(*p*) *Bordenave v. Gregory*, 5 East, 107. In proof of a tender of goods to be carried on board a ship, the bringing them to a convenient place, and offering to put them on board, is sufficient. *Stone v. Gilliam*, 1 Show, 149. 12 Vin. Ab. T. b. 115.

(*q*) Per Lord Ellenborough, C. J. 5 East, 202.

(*r*) *Seaward v. Wilcock*, 5 East, 198. [See *Hampton v. Speckena-gle*, 9 Serg. & Rawle, 212.]

(*s*) 1 Bl. Rep. 450; Doug. 463. [Yelv. 101, note.]

(*t*) *Lacon v. Hooper*, 6 T. R. 224. *R. v. Adderley*, Doug. 463; 2 Bl. Comm. 144. [1 Scho. & Lef. 521.] A conviction under the statute 5 Ann. c. 14. s. 4, must take place within three lunar months. *R. v. Bellamy*, 1 B. & C. 500.

(*u*) *Lang v. Gale*, 1 M. & S. 111. See *Smith v. Brown*, 2 Marsh. 41. [*Shapley v. Garey*, 6 Serg. & Rawle, 539.]

(1) [In Pennsylvania, South Carolina, Massachusetts, Kentucky and Tennessee, the word month mentioned generally in a statute, is considered a calendar month. *Brudenell & al. v. Vaux & al.*, 2 Dallas, 302. *Commonwealth v. Chambre*, 4 Dallas, 143. *Moore v. Houston*, 3 Serg. & Rawle, 184—*Alston v. Alston*, 2 Const. Rep. 604—*Avery & al. v. Pixley*, 4 Mass. Rep. 460. *Hunt & uz. v. Holden*, 2 ib. 170—*Payne v. Wallace*, 2 Marsh. 244—*Cook v. Shute*, Cooke's Rep. 67.

In New York, lunar months are understood to be intended in statutes, unless there is something particular to indicate calendar months. *Stackhouse v. Halsey*, 3 Johns. Ch. Rep. 74. *Loring v. Halking*, 15 Johns. 119.]

struction in the case of a statute. In the case of a bill of exchange, the computation, according to the law-merchant, is by calendar months (x) (1).

PART
IV.

Where a thing is to be done in a time specified after a particular fact, the day of the fact is to be reckoned as inclusive; as under the stat. 27 Eliz. c. 18, which limits an action against the hundred to a year after the robbery (y), or where a month's notice of an intended action is required, for then the month is to be computed inclusive of the day on which the notice was served (z) (2).

Computation
of time.

Where a month's notice of action was requisite, and notice was given on the 28th of April, and the writ was sued out on the 28th of May, it was held that the action was not premature (a).

(x) Bayley on Bills.

(y) Hob. 139; 2 Rol. 520, l. 27; Doug. 465; 3 T. R. 623; Com. Dig. Tempe. A.

(z) *Castle v. Burditt*, 3 T. R. 623. *Clayton's case*, 5 Rep. 1. *Osborn v. Rider*, Cro. Jac. 135. *Bellasis v. Hester*, 1 Ld. Raym. 280. Lutw. 1591. So under the stat. 21 Jac. c. 19, s. 2, the day of a trader's arrest is to be reckoned in the two months lying in prison, which constitutes bankruptcy (*Glassington v. Rawlins*, 3 East, 407; 4 Esp. C. 224.) But the first sect. of the Annuity Act, which requires deeds to be enrolled within twenty days of the execution, &c. means twenty days exclusive of the day of execution. *Ex parte Fallon*, 5 T. R. 283. *Vide supra*, 679, note (c).

(a) 3 T. R. 623.

(1) [*Leffingwell v. White*, 1 Johns. Cas. 99. acc. So in the case of a single bill, in Pennsylvania. *Shapley v. Garey*, 6 Serg. & Rawle, 539. So in matters of foreclosure in equity, even in England. *Coote on Mortgages*, 528, cites *Anon.* Barnardiston's Ch. Rep. 324. 2 Eq. Ca. Ab. 605.]

(2) [If a promissory note be payable in a certain number of days from the date, or from the day of the date, the day of the date is to be excluded in the computation. *Henry v. Jones*, 8 Mass. Rep. 453. *Avery v. Stewart*, 2 Conn. Rep. 69. So, of a bill of exchange, payable at so many days' sight. *Pierpont & Lord v. Graham*, Circuit Court, April, 1820. Wharton's Digest, 168.]

In computing the thirty days after judgment, during which an attachment on mesne process remains in force, the day on which judgment was rendered is to be excluded. *Portland Bank v. Maine Bank*, 11 Mass. Rep. 204. So, under the statute which allows the owner of an equity of redemption, sold on execution, to redeem it, "within one year next after the time of executing, by the officer to the purchaser, the deed thereof," the day on which the deed is executed is to be excluded in the computation. *Bigelow v. Willson*, 1 Pick. 485. But under the statute of limitations, which bars an action unless brought "within six years next after the cause of action accrued," the day on which the cause of action accrued is to be included; for an action might have been commenced on that day. *Presbrey & al. v. Williams*, 15 Mass. Rep. 193.]

PART
IV.

Where the cause of action is the seizure of goods, the time limited by statute runs from the seizure (b). But where the time is limited not after the fact but after the day of the date, that day is not to be included (c).

* 1400 Term. * The whole term is, in consideration of law, but one day, and all allegations and entries which are of the term generally have relation to the first day of the term; as in the case of a judgment (d); so if a deed be alleged to have been enrolled of a specified term, the law will intend that it was enrolled on the first day of the term (e); and where the bill is intituled generally of the term, it refers to the first day of the term. But if the cause of action has, in fact, arisen after the commencement of the term, but before the bill was actually filed, and there be no special memorandum of the time of filing the bill, the plaintiff may show that the action was not premature by proof of the writ (f), or by proof that the declaration was subsequently filed; but otherwise he would be nonsuited (1).

In proceeding by bill in the King's Bench, and in actions in the Exchequer, the memorandum on the record is

(b) *Godin v. Ferris*, 2 H. B. 14; *Saunders v. Saunders*, 2 East, 254, P. C.; *Smith v. Wiltshire*, 2 B. & B. 622. *Secus*, where the cause of action is a continuing one, as by imprisonment, *supra*, 798. See *Crook v. M'Tavish*, 1 Bing. 167.

In commercial matters, it seems that a calendar month will be intended. *Cockell v. Gray*, 3 B. & B. 186. [*Jolly v. Young*, 1 Esp. C. 186.]

(c) Hob. 139. Com. Dig. Bargain and Sale, B. 8. [See *Hampton v. Erenzeller*, 2 Browne's Rep. 19. *Bigelow v. Willson*, 1 Pick. 494. *Presbrey & al. v. Williams*, 15 Mass. Rep. 194.]

(d) 1 Bulst. 35. 69.

(e) 4 Co. 71, a. Where the day is material, a particular day of the term should be alleged, 4 Co. 71. Yel. 35.

(f) *Morris v. Pugh*, 3 Burr. 1241; 1 Bl. Rep. 312. *Southouse v. Allen*, Tr. 8 G. 2. Com. Dig. Temps. C. 8. Even in a penal action, *Ib.* If the defect appear on the record, the objection is fatal on demurrer, *Pugh v. Robinson*, 1 T. R. 116; but if the cause of action be laid on the first day of the term, it is sufficient, although the memorandum be general; for the term does not commence for the purpose of delivering a declaration until the sitting of the Court. *Ibid.* In *Wilton v. Girdlestone*, 5 B. & A. 847, where the bill against an attorney was intituled generally of Michaelmas Term, but the memorandum showed that it was filed November 28th, evidence was admitted that it was actually filed on the 24th of December. Abbott, C. J. saved the point, but the Court seem to have decided upon the sole ground that proof of a demand and refusal on the 29th of November was evidence of a conversion previous to the 28th.

(1) [See Yelv. 71, note (2), and cases there collected. *Sabin v. Wood*, 10 Johns. 218. *Bishop v. Kaye*, 3 B. & A. 605.]

of the term when the declaration was filed. But where the suit is by original in the King's Bench, or is in the Common Pleas, the title of the record * is of the term in which issue was joined, without reference to the time of filing the declaration or plea (g). Hence, the record in an action by bill will sometimes show that an action has been properly brought within a time limited, where the record in a suit by original, or in the Common Pleas, would show the contrary, and would render it necessary to prove the real commencement of the action by means of the writ to show that it was in time; as, where an action is brought against a constable for an act done by him in the execution of his office. So, on the contrary, a record in a suit by original, or in the Common Pleas, might show that the action had not been brought too soon; where the record in an action by bill would show that it was premature, and render it necessary to prove the real commencement of the action at a later time; as where an action is brought by an attorney for fees, within the stat. 2 Geo. II. c. 23 (h).

Term.
* 1401

A plaintiff may consider the issuing of a *latitat* either as mere process, or as the commencement of his action (i). And he may prove a cause of action between the issuing of the *latitat* and filing of the declaration, in the case of bailable as well as of common writs (k).

Commence-
ment of action.

A bill of Middlesex or *latitat* is a good commencement of an action, to save the statute of limitations or a tender (l).

* In the Common Pleas the production of the *capias ad respondendum* proves the commencement of a penal or other action (m). And if to a plea of tender, or of the sta-

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(g) 2 Will. Saund. 1. n. 1.

(h) *Supra*, 131. Where the plaintiff's bill had been delivered September 30th, 1797, and the record on attachment of privilege in C. B. was intitled generally of Hilary Term 1798, it was held to be incumbent on the defendant to prove, if he could, by the production of the writ, that the action had been in reality commenced before the expiration of the month. *Webb v. Pritchett*, 1 B. & P. 263.

(i) *Wood v. Newton*, 1 Wils. 141.

(k) *Best v. Wilding*, 7 T. R. 4. [1 Sellon's Practice, 83.] It is sufficient to show a writ sued out in time, and a return in time indorsed upon it; it is not necessary to show that the writ was delivered out of the sheriff's office. *Taylor v. Hopkins*, 5 B. & A. 489.

(l) *Day v. Church*, 1 Sid. 53. *Walden v. Greg*, *ibid.* 60. *Holliester v. Coulson*, 1 Str. 550. *Crookatt v. Jones*, 2 Str. 736. *Johnson v. Smith*, 2 Burr. 961. *Morris v. Pugh*, 3 Burr. 1243. *Foster v. Bonner*, Cowp. 454.

(m) *Leader v. Maxon*, 2 Bl. Rep. 924, 5; S. C. 3 Wils. 461. *Kinsey v. Heyward*, 1 Ld. Ray. 434. *Karver v. James*, Willes, 255. But

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IV.How connect-
ed with de-
claration.

tute of limitations, the plaintiff reply an original sued out within the time, it will be proved by the production of a *capias ad respondendum*, for the Court will presume an original (n).

Where the issuing of common process is relied upon as the commencement of the action, evidence is frequently necessary to connect the process with the subsequent proceedings, and to show that the process was issued with a view to the same cause of action (o). Where one writ only has been sued out, and the plaintiff has declared within the time allowed by the Court for declaring, it is sufficient to prove it, without showing a return (p), and without any evidence to connect the declaration with the writ (q).

* 1403

Commence-
ment of action.

* For the declaration being within time is presumed to be connected with the writ (r); but unless it appear from the record that the plaintiff has declared in due time, as by the memorandum where the proceeding is by bill in the King's Bench, the plaintiff must prove that the declaration has been filed or delivered in time (s), as, in the Common

see *Mois v. Bruerton*, 1 Ld. Ray. 553. *Brown v. Babbington*, 2 Lord Ray. 880.

(n) Per Ld. Kenyon in *Gosling v. Witherspoon*, sittings after Michaelmas 1788. 2 Wms. Saund. 1. n.

(o) See *Stratton v. Savignac*, 3 B. & P. 330, where it was held that a replication to a plea of tender, stating the issuing of an original *quare clausam fregit*, and return, and a second writ sued out after the tender and proceeded on, but not connected with the first writ, was bad; and the Court said that the mere circumstance of process sued out was not sufficient, since it might possibly be for some other ground of action; and if allowed to operate in the way contended for, would open a door to much inconvenience, by enabling persons to keep process secretly in their pockets till the state of the proceedings disposed them to bring it forward.

(p) *Parsons v. King*, 7 T. R. 6. *Stanway v. Perry*, 2 B. & P. 157; 4 Taunt. 555; 6 Taunt. 142, 3. It is sufficient if the plaintiff declare within a year after the return of a *latitat*, 7 T. R. 6.

(q) *Hutchinson v. Piper*, 4 Taunt. 555; 6 Taunt. 141. *Parsons v. King*, 7 T. R. 6. Even although a common *capias* is issued, and the plaintiff declares in a *qui tam* action. *Hutchinson v. Piper*, 4 Taunt. 555. Usury was committed April 30, 1810, the writ sued out 14th of March, 1811; time to declare had been repeatedly obtained, and the declaration was ultimately delivered on the last day of Michaelmas Term 1811, intitled of Easter Term 1811, and the Court held that the production of the writ within time was sufficient, and that evidence was unnecessary to show that the action proceeded on that writ.

(r) Ibid. And see the observations of Gibbs, C. J. in *Thistlewood v. Cracroft*, 6 Taunt. 141.

(s) 4 Taunt. 555; 6 Taunt. 141.

Pleas, where the issue is of a term subsequent to that allowed by the course of the Court for declaring (*t*). Where in an action on a penal statute the writ was sued out February 22d, 1813, returnable the next Easter Term, but was not returned, and the trial was after Hilary Term 1815, and the declaration on the record appeared to be of Hilary 1815, and the plaintiff did not show that the declaration was delivered in due time after the writ, it was held that he ought to be nonsuited (*u*).

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ment of action.

If there be two writs the Court will presume that the plaintiff proceeded on the second, unless he can * show * 1404 that the first was returned or served (*x*); and therefore if the plaintiff show two writs issued, the first of which is in time, with reference to the cause of action, but the second is not, he will fail, unless he prove that the first has been returned or served (*y*), even although he declared in time after the first writ (*z*).

Where a continuance of the first writ must be shown, it is essential to show that the first writ was returned (*a*). Where, in a penal action a *capias ad respondendum* issued on the 8th of November, and within the year, but had not been returned, and a second *capias* was issued on the 13th of November, but after the expiration of the year, and the declaration was of the same term, the Court, on the above distinction, held that there was not sufficient proof that the action had been commenced in time; and said, that if two writs be issued, one within a year after the offence committed, but the other not, it is necessary that the first should be returned to connect it with the second (*b*).

So, where in an action of debt for a penalty, the offence

(*t*) *Thistlewood v. Cracroft*, 6 Taunt. 141; 1 Marsh. 490. In the Common Pleas, if the trial be in term the *placitum* is of the term; if it be in vacation, it is of the preceding term. By the course of the Common Pleas the plaintiff has all the vacation of the term ensuing the term in which process is returnable to declare in. Tidd's Prac. 426, 7th edit. but he may be ruled to declare at the end of the second term. Ibid.

(*u*) *Thistlewood v. Cracroft*, 6 Taunt. 141. 1 Marsh. 497.

(*x*) *Stanway, q. t. v. Perry*, 2 B. & P. 157. *Weston v. Fournier*, 14 East, 491; *supra*, 797, 6 T. R. 617.

(*y*) Ibid.

(*z*) Ibid.

(*a*) *Harris v. Woolford*, 6 T. R. 617. It was also objected that the writ did not state the cause of action, the proceeding being under the Lottery Act 27 Geo. III. c. 1, but it was held that it could not be considered at *Nisi Prius* whether the proceedings had been regular or not. See *King v. Horne*, 4 T. R. 349.

(*b*) Ibid.

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was proved to have been committed on the 23d of July 1791; and a *latitat* was produced tested July 13th, indorsed July 27th, and returnable on the morrow of All Souls (c), and a second *latitat* was * produced, tested November 28th, 1791, indorsed January 13th, 1792, returnable on Monday next after eight days of St. Hilary, and the memorandum of the declaration was of Hilary Term 1795, and the first writ had not been returned, it was held that a nonsuit ought to be entered (d).

In an action of assumpsit it was held to be no defence to show that the defendant paid the debt after the issuing of an *alias pluries latitat*, although the writ of *latitat* was not returned, and although the debt was paid without any knowledge on the part of the defendant that the action was commenced.

Here it was unnecessary to connect the last writ with the preceding ones, and the irregularity in proceeding on the *pluries* writ was waved by the defendant's appearance (e). But it seems that if the payment had been previous to the issuing of the *pluries* writ, then, inasmuch as the plaintiff must, to entitle himself to costs, have proved a commencement of the action previous to the payment, he would have failed if he could not have proved the return of the *latitat* (f).

In general, it seems that an irregularity in the commencement of the action will not support the objection that the action has not been commenced in time (g).

* 1406 The real time of suing out a writ may be shown in opposition to the teste (h); and if in a penal action the * writ be not sued out till after the expiration of the year, al-

(c) In all continued writs the *alias* must be tested on the day when the former was returnable, 2 Salk. 699.

(d) *Harris, q. t. v. Woolford*, 6 T. R. 617. In *Bates, q. t. v. Jenkinson*, there cited, the contrary was held, on the ground that the first writ had been returned.

(e) *Toms v. Powell*, 7 East, 536.

(f) See the observations of Lawrence, J. 7 East, 536.

(g) *Harris, q. t. v. Woolford*, 6 T. R. 617; *supra*, note (a). 7 East, 536.

(h) *Johnson v. Smith*, 2 Burr. 960; *supra*, 796. An original writ should always be tested after the cause of action; and if a plaintiff to save the statute of limitations reply an original, bearing date before the cause of action it is abateable, 2 Burr. 967. So, in the case of a writ of privilege by an attorney, which is in the nature of an original. *Jones v. Burnet*, cited, *ibid.* As to the teste of an original, *vide supra*, 680.

though by relation it be within the time, the plaintiff ought to be nonsuited (i).

By the stat. 39 & 40 Geo. III. c. 105, parties in any personal action, or action of ejectment, in the Common Pleas at Lancaster, may give in evidence any cause of action, or bar, which has occurred prior to the day of the actual signing of the *capias ad respondendum*, or other process, first issued forth in such action, or prior to the day of actually serving such declaration in ejectment, although such matters may not have occurred prior to the teste and return of the original writ, or prior to the assizes, or time wherein or whereof such declaration shall be filed or recorded (k).

Although the law does not in general regard a fraction of a day, yet a day is always considered to be divisible for the purposes of justice (l) (1). If a cause * of action be laid on the first day of the term, a general memorandum is sufficient, for the term for the purpose of delivering a declaration does not commence till the sitting of the Court

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(i) *Morris v. Harwood*, Mic. 5 Geo. III. B. N. P. 195.

(k) For further observations, see tit. *Hundred—Justices—Limitations—Tender*.

(l) 3 Burr. 1241; Dy. 345; 2 Salk. 625; 3 Wils. 274. [*Hampton v. Erenzeller*, 2 Browne's Rep. 19.] In the older authorities it is stated, with a precision somewhat amusing, that as an instant is the end of one time and beginning of another, it may be divided into two parts (1). So that in consideration of law there is a *priority* of time in an instant, Co. Litt. 185, b. This nice operation of bisecting an instant, is, however, permitted, merely *ex indulgentia legis*; for though according to what is termed "the learning of instants," an instant may be divided into two parts, yet the law will by no means permit it to be carved out into three, *Fitzwilliam's case*, 6 Co. 33. Where the word *instant* occurs in a rule to abide by a special plea, according to the practice of the Common Pleas, it appears that twenty-four hours is meant. (*Price v. Simpson*, 1 Taunt. 343.) But *qu.* whether *instant*, as applied to the subject matter, may not be taken to mean before the rising of the Court, where the act is to be done in Court, or before the shutting of the office on the same night when the act is to be done there. *R. v. Johnson*, 6 East, 587.

(1) [The nautical day begins at 12 o'clock at noon, and courts will take notice that dates at sea conform to this method of reckoning. *Dennis & al. v. Ludlow*, 2 Caines' Rep. 111. In *Shove v. Dow*, 13 Mass. Rep. 520, where two officers had attached the same land, and one made return that he attached it "one minute past 12 o'clock, A. M.," and the other "immediately after midnight" of the same day—the court held that the attachments were *simultaneous*—and both plaintiffs, having seasonably and duly levied their executions on the land thus attached, were held to have taken each a moiety thereof, as tenants in common.]

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on that day (m). A permit under the stat. 26 Geo. II. c. 59, s. 30, dated at 9 o'clock in the morning, and allowing an hour for the removal of wine from *A.*'s stock; and two days more for the delivery of wine into *B.*'s stock, expires at 10 in the morning of the second day after the date (n). Where a sheriff seizes the goods of a trader under a *fiery facias*, and after the seizure, but on the same day, the trader is arrested, and becomes bankrupt from lying in prison for two months, the assignees cannot recover against the sheriff (o).

Reasonable
time.

It has been said, that reasonable time is a question of law (p). In the abstract, reasonable time includes both law and fact; but it seems to be clear, that in particular cases reasonable time may either be an inference of law from the particular facts, that is, where they are such as fall within any general known rule of law, or may depend upon the conclusion of the Jury that the time is reasonable or not, in point of fact, with reference to the ordinary practice and course of dealing, or to a man's duty as a moral agent, under the particular circumstances of the case (q).

- * 1408 * If a deed be proved to have been delivered, but the time of delivery does not appear, it shall be intended to have been delivered on the day of the date (r).

TITHES.

In an action of debt under the stat. 2 & 3 Ed. VI. c. 13 (s), for not setting out tithes, the plaintiff must establish, 1st, his title as rector, lay impropiator, &c.; and 2dly,

(m) *Pugh v. Robinson*, 1 T. R. 116.

(n) *Cooke v. Sholl*, 5 T. R. 255.

(o) *Thomas v. Desanges*, 2 B. & A. 586.

(p) Com. Dig. Temps. D.

(q) 4 B. & A. 389; 2 Stra. 1271; Co. Litt. 56. b.; Willes, 135. 206. Part III. tit. *Law and Fact*, p. 411, & seq. [See Vol. II. 255, note (1).]

(r) Per Coke, C. J. who directed the jury accordingly, 1 Rol. R. 3, pl. 5; *Stone v. Grabham*, 12 Vin. Ab. Q. a. 2 Bulst. 218.

(s) This stat. gives treble the value of the tithes withheld; and when the single value found by the Jury does not exceed 20 nobles (6l. 13s. 4d.) the stat. 8 & 9 W. III. c. 11, s. 3, gives the plaintiff his costs; if the Jury find the single value above that sum, or an arbitrator awards a less sum, or where the plaintiff declaring for a less sum, the defendant suffers judgment by default, so that the value is not found by the Jury, the defendant is not liable to these costs. See *Barnard v. Moss*, 1 H. B. 107. But still the costs may be taxed for the plaintiff on a count for the single value. Ib.

the defendant's liability as an occupier of lands within the parish, &c. ; 3dly, the value of the tithe.

1st, Direct evidence of title in detail consists in proof of the plaintiff's ordination by the bishop, and his institution and induction, his subscription to the Act of Uniformity in the presence of the bishop, and his reading the 39 articles within two months, and declaring his assent to them (*t*). But it will be presumed that he has read them till the contrary be proved (*u*).

* Presumptive evidence of title is usually sufficient, as, * 1409
by proof of undisturbed possession of the rectory and perception of tithes without dispute (*x*). But evidence that the plaintiff, as farmer of the tithes, called a meeting of the parishioners, and proposed a composition, which was not followed by any agreement, although no one of the meeting disputed his title, was held to be insufficient (*y*). Presumptive evidence of title.

The statute 2 & 3 Ed. VI. c. 13, which gives the action, enacts, "that no person shall from thenceforth take or carry away any such or like tithes which have been yielded or paid within forty years, or of right ought to have been paid, &c." (*z*). If the declaration state that tithes have been paid within the forty years, evidence, it seems, is requisite to prove the fact (*a*). But if it be merely alleged that the tithes were payable, it will be presumed that tithes were then payable to the rector (*b*), even although tithe of corn be claimed, and it appear that as far as living memory extends the lands have been in pasture, and have paid no tithe (*c*). And if the defendant object that the articles of

(*t*) B. N. P. 188.

(*u*) *Powell v. Milburn*, 3 Wils. 355 ; 2 Bl. Rep. 851. After fifteen years possession of a benefice, the testimony of several persons, who stated that they had generally attended divine service for the two months next after the plaintiff's possession, and that none of them had heard him read the 39 articles, was held to be of no weight. *Chapman v. Beard*, Gwill. 1482 ; 3 Anstr. 942.

(*z*) *Radford v. Macintosh*, 3 T. R. 635 ; *Barnes v. Messenger*, 13 East, 250, *infra*, 1411, (*k*). *Chapman v. Beard*, Gwill. 1482 ; B. N. P. 188. Possession of tithes is sufficient. *Wheeler v. Heydon*, Cro. Jac. 328.

(*y*) *Wyburd v. Tuck*, 1 B. & P. 458 ; Gwill. 1517.

(*z*) The omission of this allegation is fatal, even after verdict. *Butt v. Howard*, 4 B. & A. 655.

(*a*) *Ld. Mansfield v. Clarke*, 9 Geo. III. 5 T. R. 264, n.

(*b*) *Mitchell v. Walker*, 5 T. R. 260.

(*c*) *Ibid.* In *Kinaston v. Clarke*, Summer Assizes, Salop, 1769, cited, 5 T. R. 265, n. Yates, J. is stated to have said, that he thought it necessary to prove perception of tithe in kind, in analogy

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which tithe is claimed were not * cultivated in England previous to the stat. of Ed. VI. the burthen of proof will lie upon him (d).

Tithes are due to the rector of common right; but where a vicar or other person claims, proof of the endowment or other title is necessary.

Proof of
perception.

Proof of the actual perception of tithes of the kind claimed is forcible evidence of the right. Evidence, even in a single instance within thirty years, of a composition with the vicar for agistment tithe of a particular close, has been held to be sufficient to entitle him to small tithes, on a bill filed by him for tithe herbage and furze (e).

Proof of the payment even of a bad modus is evidence of title to tithes in kind. For it is a temporary composition for the tithes demanded, which is evidence of the enjoyment of and title to the tithes themselves (f).

- An endowment may be established by evidence of usage, which would not support a prescription. Many endowments have been made within the time of legal memory, and the deeds being lost can be proved by usage only (g). Usage is the broad ground of presuming *endowment* in favour of the vicar's endowment. And if tithes have been usually received by the vicar, which are not expressed in the original endowment, a subsequent endowment will be presumed (h).

to the meaning of the Legislature at the time of passing the Act. But Buller, J. said that the note of this case was a loose one, and not to be depended on.

(d) *Hallewell v. Trappes*, 2 N. R. 173.

(e) *Goole v. Jordan*, Gwill. 648.

(f) *Travis v. Oxton*, Gwill. 1074.

(g) *Jackson v. Walker*, Gwill. 1231.

(h) *Williams v. Price and others*, 4 Price, 156; *Cunkliffe v. Taylor*, 2 Price, 329; *Parsons v. Bellamy*, 4 Price, 190. But where the vicar rests on presumptive evidence of endowment arising from perception, unless he show that he has received tithe from the part of the parish in respect of which exemption is claimed, the defendants will be entitled to an issue. *Armstrong v. Hewitt and others*, 4 Price, 216. Where several species of small tithes have been received by the vicar, which have not been included in the original endowment, which enumerated certain articles only, it was held that it extended to tithes *ejusdem generis*. *Manby v. Lodge*, 9 Price, 244. *Manby v. Curtis*, *Ibid.* 284. So if he has taken other small tithes, agistment tithes will be decreed. *Scott v. Lawson*, 7 Price, 267.

Vide etiam, *Kennicott v. Watson*, 2 Price, 250, n.; but the vicar must show actual perception of such other tithes. *Ibid.*

* Evidence of the perception of the tithe of hay, and of small tithes by a vicar, is evidence of a prescription which supposes an endowment (i).

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Proof that the rector of the parish *B.* has for many years received tithes for land in the parish *H.* is evidence of title in the rector of *B.* to the tithe of that land as against the occupier (*k*).

Perception.

A receipt for tithes, signed not by the receiver, but merely by his deputy, has been held to be inadmissible (*l*). And where a modus of every tenth day's cheese for a certain period of the year, in lieu of milk, was insisted on, proof of the delivery of the cheese at the house of the tithe-gatherer, but not to himself, was held to be inadmissible to prove the perception of the modus (*m*). Payment of a composition for turnips, whether pulled, or eaten off the ground, was held to be no evidence or perception of agistment tithe (*n*).

Payment, &c.

If the plaintiff sue as lay impropiator, strict proof of his title consists in showing that the tithes belonged to one of the dissolved monasteries, and were granted to one from whom he deduces his own title (*o*). Enjoyment of the tithes and ancient deeds conveying the tithes, are in such cases evidence of title (*p*).

Lay impropiator.

If he sue as lessee of tithes, he must, in addition to the title of his lessor, prove the lease (*q*). And it * seems that * 1412 if he show himself to be entitled to a moiety only (*r*), as under an assignment of a lease by one of two joint tenants, he will be entitled to recover (*s*).

Lessee.

It seems that if a lessee of tithes describe himself as the owner and proprietor, the objection is fatal (*t*).

(i) *Travis v. Oxton*, Gwill. 1066.

(k) *Barnes v. Messenger*, 13 East, 250.

(l) *Yate v. Leigh*, Gwill. 861.

(m) *Wake v. Russ*, Gwill. 1396; 1 Anstr. 295.

(n) Gwill. 1462.

(o) Com. Rep. 651.

(p) *Supra*, Prescription—Grant. *Kinaston v. Clarke*, 5 T. R. 265, n. Gwill. 960.

(q) B. N. P. 188. And a lessee cannot maintain an action under the statute in respect of tithes severed before the lease, for on severance they vested in the lessor. *Wyburd v. Tuck*, 1 B. & P. 458.

(r) *Nelthorpe v. Dorrington*, 2 Lev. 113. Per Buller, J. 1 B. & P. 464.

(s) *Wyburd v. Tuck*, 1 B. & P. 458.

(t) *Stevens v. Aldridge*, 5 Price, 334. The objection was not

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Determination
of composition.

* 1418

If there has been any composition for tithes, the plaintiff must show that it has been determined by a six months notice previous to the end of the current year (u). Where the inhabitants had for many years been in the habit of paying a composition for vicarial tithes, and the vicar at the usual time of settlement gave oral notice that he should for the future require tithes to be paid in kind, the notice was held to be sufficient to determine the composition (x). But a * mere conversation, and demand of tithes, and refusal of the annual composition of 40s. without any formal notice, was held to be insufficient (y).

Where the defendant sets up a modus, but fails, it seems that he cannot afterwards insist upon the want of notice (z), any more than a tenant can after setting up an adverse title.

Defence.

The defendant may, it seems, in an action for tithes in specie, prove a simoniacal presentation, which, under the stat. 31 Eliz. c. 6, renders the clerk's admission, institution,

taken on the trial, but after a verdict for the defendant. Wood, B. said, that there had been many instances of new trials being refused where a fatal objection appeared on the record.

(u) *Bishop v. Chichester*, 2 Bro. Ch. R. 161; Gwill. 1217. 1220. The same notice must be given as to a tenant of lands. *Hewitt v. Adams*, Dom. Proc. April 19th, 1782; 12 East, 84, n. cited. 1 B. & P. 460. If A. lease tithes to B. pending a composition, and A. afterwards determines the lease of B. before any alteration is made in the composition, A. cannot determine it without six months notice. *Wyburd v. Tuck*, 1 B. & P. 458. If the bargainee of tithes for one year underlet them to the occupiers, no notice from the bargainee for the following year is necessary. *Cox v. Braine*, 3 Taunt. 95. A composition for tithes ceases with the death of the incumbent, as far as regards his successor; if the successor receives the next payment he is liable to the executors of his predecessor for such part only as would have been paid to him in kind had he survived, and not *pro rata*, in proportion to the time which had run between the last payment and his death. *Williams v. Powell*, 10 East, 269.

(x) *Leech v. Bailey*, 6 Price, 504. A parol contract for the retainers of tithes is merely personal, and ceases on a change of the occupier or incumbent, *Paynton v. Kirkby*, 2 Chit. R. 405. *Quæ.* whether it be *prima facie* evidence of value. *Ibid.*

(y) *Fell v. Wilson*, 12 East, 83.

(z) Per Richards, C. B. in *Leech v. Bailey*, 6 Price, 504. Lord Thurlow was of a different opinion in *Bishop v. Chichester*, on the authority, it seems, of *Adams v. Hewitt*, and contrary to his own judgment. See Peake's L. E. 443, note (c). But in *Bower v. Major*, 3 Moore, 216; 1 B. & B. 4, a refusal to pay a composition, alleging a modus, was held to be sufficient to determine the composition.

and induction, wholly void (a). But this is no defence to an action for a composition for tithes where one year's composition has been paid (b), or to an action for use and occupation, where rent has been paid to the parson (c).

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A layman (d) cannot prescribe *de non decimando*, either as against a priest or lay rector (e); for the maxim of law is *nullum tempus occurrit ecclesiæ*; and therefore the mere fact that tithe has not been paid affords no defence. Tithe is every day claimed for lands inclosed out of wastes, which have never paid tithe before (f). But as ecclesiastics might, previously to the restraining statutes, have aliened their possessions ** sub modo* (g), the defendant may prove either an actual severance of the tithes, or that a composition real has been entered into. * 1414

And the fact of severance may be established not only by means of the deed, but also by such presumptive evidence as warrants the conclusion of severance in fact. Thus, in the case of the *Countess of Dartmouth v. Roberts* (h), it was proved that the vicar had been endowed of the tithe of hay throughout the whole parish in the year 1253, and that the right remained annexed to the vicarage on the dissolution of the monasteries. The plaintiff, on the other hand, claimed under a deed, purporting to convey the tithe, dated 1676, and proved perception as far as living memory extended. Evidence was also given that the vicar had in the year 1777 instituted a suit for the tithe of hay against an occupier of land held by the present plaintiff, but that the right had been denied by the defendant's answer, and the suit abandoned. The Jury by their verdict negatived the claim of the vicar; and the Court held that

Proof of
severance.

(a) Hob. 168. *Brooksby v. Watts*, 6 Taunt. 333. [2 Marsh. 38. S. C.]

(b) *Brooksby v. Watts*, 6 Taunt. 333.

(c) *Cooke v. Loxley*, 5 T. R. 4.

(d) But a bishop, his tenant or copyholder, may show that he and all his predecessors have held the manor by them and their tenants discharged of tithes. *Bishop of Winchester's case*, 2 Co. 44.

(e) See *Lord Mansfield v. Clarke*, 5 T. R. 264, n.

(f) Per Lord Kenyon, *Mitchell v. Walker*, 5 T. R. 260.

(g) See the observations of Buller, J. in *Mitchell v. Walker*, 5 T. R. 260; and of Wilmut, C. J. in *Lord Mansfield v. Clarke*, 5 T. R. 264, n. So, although a college is disabled by the stat. 13 Eliz. from making a grant, yet, as before that statute colleges were at liberty to make such grants, if it appear that land, although constantly ploughed, has paid no tithes, the case will lie open to the presumption of a grant. *Ibid.*

(h) 16 East, 334. [See 1 B. & A. 182.]

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Severance.

* 1415

the verdict was right. Lord Ellenborough observed, "Assuming that under the endowment the vicar was once well entitled to the tithe of hay co-extensive with the limits of his parish, he might, before the restraining statutes, have granted it to another ecclesiastical person, with the consent of the patron and ordinary; there would then have been a portion of tithes dissevered from the vicarage; and there was evidence that it was so dissevered, * from the conveyance of the tithe in 1676 to Lord Halifax, which, after their disseverance, but prior to the restraining statutes, might have got into lay hands. We therefore want to pray in aid only this supposition as to these portions of tithe which appear to have been enjoyed, dissevered from the vicarage, that they were so dissevered. And in favour of modern enjoyment, which is the best interpreter of right where documentary evidence does not exist, we will, in conformity with Lord Kenyon, who said that he would presume two hundred deeds if necessary, presume that a disseverance took place."

Composition
real.

A real composition in the case of an ecclesiastical rector must have been made before the 13th of Eliz. by deed executed by the incumbent, together with the patron and ordinary, by which the particular lands were freed of tithes in consideration of a recompense to the incumbent and his successors (*k*). The direct evidence of such a composition is the deed itself; this evidence can, however, rarely be expected (*l*). And such a composition may be established by evidence short of the production of the deed (*m*).

But mere usage in receiving a specific money payment in lieu of tithes is not in itself sufficient evidence on which to found a presumption of such a deed; for temporary agreements may be continued for convenience by a succession of incumbents; and there is no adverse enjoyment, such as supplies a presumption of a grant, in ordinary cases (*n*).

* 1416 The rule is also to be considered, it seems, partly as a rule of policy to prevent the church from being * defrauded; were it otherwise, every bad modus would be turned

(*k*) Gibson's Codex, tit. 30. c. 5. Degge's P. C. part 2 c. 20
Knight v. Halsey, 2 B. & P. 204.

(*l*) 2 B. & P. 206.

(*m*) Ibid. and *Saubridge v. Benton*, 2 Anstr. 375.

(*n*) P. C. *Knight v. Halsey*, 2 B. & P. 206; *supra*, 1214.

into a good composition (*o*), and consequently none can be presumed which is subsequent to the stat. 13 Eliz. Hence it is now an established rule that some evidence, independently of mere usage, must be adduced, to show that such composition did once exist (*p*). As, where instruments are given in evidence which strongly denote that such a transaction has taken place (*q*).

Composition
real.

So, where in fact the occupier has long retained that which by law he ought not to retain, and yielded to the parson that which of common right he is not bound to yield, this mutuality of loss and gain acquiesced in for a length of time is strong corroborating evidence that such an agreement has been executed by the necessary parties. But the bare fact that the parson has received less than of common right is due, or that which is due in a less beneficial manner, is not a ground for presuming a real composition; for where there is no mutuality it cannot be presumed that the parson, with the consent of the patron and ordinary, agreed to forego his legal rights (*r*).

A disseverance, or composition real, cannot be presumed from the mere fact of non-payment of tithes to the church. Upon a bill filed by the vicar of Chatteris for an account of the tithes of a tract of land called Acre Fen, and where it was answered, that from time immemorial, and before the endowment of the vicarage, * the rector * 1417 inappropriate held the Miles Lands in lieu of the tithes of Acre Fen, but no evidence was offered to prove this, except that no tithe within living memory had been paid in respect of Acre Fen, and the deposition of a witness as to hearsay declarations by old persons, since deceased, that the Miles Lands had been given in lieu of the tithes of Acre Fen, the deposition was rejected, and the evidence held to be insufficient (*s*).

As an ecclesiastical rector cannot sever the tithes by grant, no grant can be presumed; but inasmuch as a lay impropriator may sever and aliene the tithes, it may no

(*o*) *Knight v. Halsey*, 2 B. & P. 206; *Heathcote v. Mainwaring*, 3 Bro. C. C. 217.

(*p*) *Robinson v. Appleton*, 4 Wood, 10. *Haues v. Swain*, 4 Wood, 313. *Knight v. Halsey*, in Dom. Proc. 2 B. & P. 172. 206. Per Lord Hardwicke, *Rotherham v. Fanshawe*, 3 Atk. 628.

(*q*) *Sawbridge v. Benton*, 2 Anst. 375.

(*r*) *Knight v. Halsey*, 2 B. & P. 206. Rolle's opinion in the case of the *Earl of Hertford v. Leech*, 8 Car. I.; 2 Danv. Abr. 611, tit. *Dismes*, I. pl. 2; Vin. Ab. tit. *Dismes*, (I. a) pl. 2.

(*s*) *Chafield v. Fryer*, 1 Price, 253; Wood B. *dissentiente*.

PART
IV.Composition
real.

doubt be presumed, upon proper evidence, that he has done so. Doubts, however, have occurred upon the question, what evidence will be sufficient to support such a presumption. It is clear, that proof of actual and continued possession of the tithes by the party who claims adversely to the rector, is evidence on which the existence of a grant may be founded (t).

But in the cases of the *Corporation of Bury v. Evans* (u), *Nagle v. Edwards* (x), and *Meade v. Norbury* (y), it was held that the long enjoyment of lands without payment of tithes was not a sufficient foundation for presuming a grant from the lay impropriator. On the other hand, Wilmut, * 1418 C. J. in the case of *Lord * Mansfield v. Clarke* (z), was of opinion, that if in the case of a lay impropriator, it appeared that land had been constantly ploughed, and that tithes had never been paid, the case was open to the presumption of a grant, and that it had been so settled in *Rotherham v. Fanshawe* (a).

Buller, J. in the case of *Mitchell v. Walker* (b), intimated his opinion that such non-payment would afford some ground for such a presumption.

Lord Loughborough, in the case of *Rose v. Calland* (c), expressed his disapprobation of the doctrine in the Court of Exchequer, in not presuming a grant, under such circumstances, by the lay impropriator.

Lord Mansfield, in the case of *Franklin v. Holmes* (d), expressed his disapprobation of the doctrine, that a composition real could not be proved by presuming a grant before the stat. 13 Eliz.

(t) *Strutt v. Baker*, 4 Gwill. 1430, and the cases there cited; and per Richards, C. B. in *Meade v. Norbury*, 2 Price, 345. *Scott v. Airey*, 4 Gwill. 1174.

(u) 2 Gwill. 757.

(x) 3 Anst. 702.

(y) 2 Price, 338. Note, that in this case, in addition to the mere evidence of non-payment, it appeared that the land in question had once been in the possession of the lay impropriator; that a former impropriator had declared that the land was tithe-free; and that fifteen years before the impropriator had executed a lease of tithes, excepting the land in question. But the Court held that this evidence was not sufficient to support the presumption of a grant.

(z) 5 T. R. 264, n.

(a) 3 Atk. 628; 1 Eden's Cases in Chan. 276.

(b) 5 T. R. 260.

(c) 5 Ves. 186. Note, the dictum of Lord Loughborough in that case was extra-judicial. Per Richards, B. 2 Price, 367.

(d) 3 Gwill. 1229.

Lord Eldon, C. observed (e), that there was a decision in the Court of Exchequer against it in the year 1727, and that both Lord Talbot and Lord Hardwicke struggled against it.

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Composition
real.

In the case of *Meade v. Norbury* (f), Wood, B. argued very strongly that a grant was to be presumed, insisting, that upon general and established legal principles, a grant was to be presumed from long-continued enjoyment; and that as a grant on such evidence might be presumed, and had frequently been presumed, * against the Crown itself (g) *a fortiori*, it might be presumed against a grantee under the Crown. * 1419

Without entering into any discussion on this question, it may be observed, that at all events the grounds of presumption in the two cases differ very essentially. An ecclesiastical rector could not enter into any composition even before the statute 13 Eliz., without receiving in return a recompense which should enure to himself and his successors; and a rule of policy intervenes, founded on the necessity of preserving the rights of the church, and perhaps also, the consideration that ecclesiastical incumbents, who have a mere life-interest in the temporal revenues of the church, are likely to be more negligent in permitting encroachments than laymen would be in respect of their own private absolute property. A layman, on the other hand, might alienate at any time, as well before as after the statute, of his own authority, for a sum in gross, and is as likely to guard and husband such property with as much vigilance and industry as any other, so that the same degree of presumption is afforded by his laches as in any other case of private property; and, finally, no rule of policy intervenes to counteract the usual and ordinary rules of presumption. Whatever, therefore, the law may be on this question, it is impossible, in principle, to doubt that stronger evidence is necessary to prove a composition in the case of an ecclesiastical than in that of a lay rector.

Where the defendant insists upon a discharge by a *Modus*, it is of course incumbent upon him to prove * the * 1420 payment of a sum in lieu of tithes so small that it may be

(e) 17 Ves. 127.

(f) 2 Price, 345.

(g) *R. v. Carpenter*, 2 Show. 48. *Mayor of Hull v. Horner*, Cowp. 102. *Powel v. Milbanke*, 1 T. R. 399, n. *Oxenden v. Skinner*, 4 Gwill. 1513. *Vide supra*, 1221. See also the opinion of Clarke, B. in *Fanshawe v. More*, 2 Gwill. 780. In the case of *Berney v. Harvey*, (17 Ves. 119), Eldon, C. adopted the distinction between actual pernanacy and a mere retainer.

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IV.

Modus.

considered to have been an immemorial payment. Such payment, when established in evidence, will usually impose upon the plaintiff the burthen of showing its origin, although the witnesses term it a composition (*h*). A variance in the amount paid destroys the modus (*j*).

The nature of the evidence adapted to establish or rebut a modus, or to establish a right to tithe by special custom, has already been adverted to. The documentary evidence in such cases consists in judgments, decrees, depositions, bills and answers, public surveys, inspeximus, terriers, books of account, or other private writings.

Verdict,
decree, &c.

A verdict between a parson and occupier of lands is evidence, though not conclusive, upon the like point between the parson and another occupier relating to the same lands (*i*).

A decree between the same parties, on the same point, is conclusive evidence (*k*). But it is not conclusive where the parties to the suit were not competent to bind the right in question. Thus, in a suit between the vicar and occupiers for an account of small tithes, a former decree between the vicar and impropriator, declaring the former to be intitled to all small tithes under the endowment, was held to be inconclusive; for the vicar had no power to bind the interests of his successors, and the decree in his favour could not be more conclusive than if it had been to his prejudice, and it was considered to be of no more force in respect of the successors of the vicar, who was a party to it, than a decree for an account of the tithes (*l*).

* 1421

* Where the defendants, in an action by a rector for tithes, insisted that the lands formerly belonged to a monastery, dissolved by the stat. 31 Hen. VIII., and offered in evidence a decree to which the lessee, and not the impropriator, was a party, it was held that it was admissible (*m*), on the ground that it would have been evidence for the plaintiff, had the lessee prevailed.

But in general a decree is not admissible unless it relate to the same lands and title (*n*).

(*h*) *Driffield v. Orrell*, 6 Price, 325. Or although the witnesses term it a rent. *Manby v. Lodge*, 9 Price, 246.

(*j*) *Short v. Lee*, 2 J. & W. 493.

(*i*) *Benson v. Olive*, Gwill. 702. *Travis v. Chaloner*, Gwill. 1235.

(*k*) Vol. I. p. 190. *Carr v. Heaton*, Gwill. 1258.

(*l*) *Carr v. Heaton*, Gwill. 1258.

(*m*) *Bishop of Lincoln v. Ellis*, Gwill. 632; Bunb. 110. S. C. *Per Montague*, C. B. and Price, B.; but Page, B. dissented.

(*n*) *Benson v. Olive*, Gwill. 701; Bunb. 284.

A decree professing to establish customs of tithing, and modes of payment, obviously illegal, as moduses founded on agreements not ratified by the ordinary and patron, and not on a *bona fide* adverse suit to establish the moduses, and pronounced in a cause to which the patron and ordinary were not parties, is not binding either on the church or the court (o).

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Verdict, &c.

Depositions taken in a former cause between the parties, or those who claim under them, upon the same question, are admissible (p) after the death of the deponents (q). And it has even been held, that on the trial of an issue to try whether the vicar was entitled to agistment tithe, depositions in a former suit between a lessee and an occupier were admissible against the vicar, although neither the bill nor answer were produced, and although the vicar was not a party but a witness in that suit (r). But the principle of this decision seems to be very questionable.

Depositions.

* Upon a question of modus, the answer of the defendant to a former bill filed by the same plaintiff, in which he set up a different modus relating to the same lands, was held to be admissible evidence (s). An answer by a rector to a bill filed to establish a modus of a certain measure of meal as to one farm, admitting that the *parish* was exempt in consideration of a commutation for meal, was held to be strong evidence to prove a district modus (t).

* 1422
Bill and answer.

Ancient documents of a public nature, made under authority, are also admissible, and frequently very material evidence in cases of this description, such as pope Nicholas's taxation; the ecclesiastical survey, and minister's accounts in the time of Henry the 8th; and the parliamentary surveys in the time of the Commonwealth. These documents are, however, by no means conclusive in their nature, especially where an inference is attempted to be made from their silence as to a modus, in opposition to positive testimony (u).

Surveys.

(o) *Jenkinson v. Royston*, 5 Price, 495.

(p) *Morgan v. Nevill*, Gwill. 1046.

(q) Vol. I. p. 261—264.

(r) *Illingworth v. Leigh*, Gwill. 1615. But see *Scott v. Allgood*, Gwill. 1369.

(s) *Ashby v. Power*, Gwill. 1239.

(t) *De Whelpdale v. Milburn*, 5 Price, 485.

(u) In a late case *Driffield v. Orrell*, 6 Price, 325, where a parliamentary survey was offered in evidence to impeach a modus, Richards, C. B. observed, "The fact of a parliamentary survey not referring to a modus is nothing when opposed to proof of actual pay-

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The King's books are conclusive evidence of the value of a living (*x*); but ancient valuations are not conclusive, either as to the value of lands or of livings (*y*).

* 1423

* A survey of a religious house taken in the year 1563, was held to be good evidence to prove the vicar's right to small tithes (*s*). And copies from the cathedral churches of the surveys of crown and church-lands, made under parliamentary commissions in 1647, have been held to be admissible evidence, the originals having been lost in the fire of London (*z*).

Terrier.

A terrier, as has been seen (*a*), is an instrument made under the authority of the canon law, and it derives its authority from being found in the proper place of deposit, the church-chest (*b*), the bishop's register-office (*c*), or the registry of the archdeacon of the diocese (*d*), or from such a connection established between the instrument and the place where it is found, as reasonably accounts for its situation (*e*).

A terrier is always strong evidence against the parson, but not for him, unless it be signed by the churchwardens; and where they are of his nomination, by some of the substantial inhabitants also.

In a suit between the vicar and an impropiatrix for the recovery of agistment tithe, it was held that terriers signed by the churchwardens only, stating that the vicar had all small tithes generally, were admissible; for it was signed by persons not only disinterested, but bound from their

ment. Had that document, though it is certainly entitled to great weight on some questions, even stated that there was no *modus*, it would not, as being on that subject, *res inter alios acta*, be strong enough to overturn the positive evidence of actual payment; still less is the mere omission to mention it sufficient." And see *See v. Hockley*, 4 Price, 87; 5 Price, 377. The ecclesiastical survey does not mention *moduses*, therefore no inference can be drawn from its silence. *Robinson v. Williamson*, 9 Price, 139.

(*x*) *Stump v. Ayliffe*, Gwill. 536; Dy. 237; Cro. Eliz. 853; Cro. Car. 456; 2 Lutw. 1305; 17 Vin. Ab. 362.

(*y*) Gwill. 857. 1240. 1347.

(*s*) *Travis v. Oxton*, Gwill. 1066.

(*z*) *Underhill v. Durham*, Gwill. 542.

(*a*) Vol. I. p. 169.

(*b*) 4 Price, 218.

(*c*) Vol. I. p. 170. *Atkins v. Hutton*, Gwill. 1406; 2 Anst. 386; 3 Burn. Ecc. L. 379.

(*d*) 4 Price, 218.

(*e*) *Miller v. Foster*, Gwill. 1406; *supra*. Vol. I. p. 171.

official duty to sign it, and the want of the vicar's signature made it stronger evidence in his favour (f).

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* Such instruments, when signed by the minister and parishioners, frequently afford the strongest evidence that can be adduced, either to disprove a modus altogether, or to determine the legal nature of a payment (g). * 1424

Terrier.

A map made by one as lord of a manor, and produced by him, is evidence against him on an issue between himself and the rector, whether the former by himself, or by his agent, was in possession of glebe lands belonging to the plaintiff (h).

It has been seen that books of account of a preceding rector or vicar, relating to tithes, are evidence for his successors (i). So also are the books of a deceased lessee of an impropriate rectory, after the expiration of his interest (k). For he was under no greater temptation to fabricate false entries than a rector or vicar would be. What he might insert would not be evidence during the term, either for himself or his assignee. So a book of a former collector of ancient date, found in the hands of his successor, was admitted in evidence, although his hand-writing could not be proved (l).

Books of account.

A memorandum in an old book purporting to be a parish-register, and kept in an iron chest in the vicarage,

(f) *Illingworth v. Leigh*, Gwill. 1615; B. N. P. 248.

(g) See *Mytton v. Harris*, 3 Price, 19; *Drake v. Smyth*, 5 Price, 369. Where subsequent terriers all mention a money payment, their effect is not overcome by the omission in former terriers; one of which stated that there was no prescription, and another, that all petit tithes were due. *Stuart v. Greenall*, 9 Price, 113.

(h) *Allott v. Wilkinson*, Gwill. 1585; *supra*, Vol. I. 327.

(i) Vol. I. p. 320, *Ld. Arundel's case*, Gwill. 620; 12 Vin. Abr. 255, pl. 3; *Legross v. Lovemore*, Gwill. 529. A rector's books which remain in his own possession are less entitled to credit than receipts. *Robinson v. Williamson*, 9 Price, 139.

(k) *Illingworth v. Leigh*, Gwill. 1617. It has been held that the books of a lay impropriator are also admissible in evidence. *Short v. Lee*, 2 J. & W. 479.

(l) *Jones v. Waller*, Gwill. 847. As the character of a tithe collector is a private one, proof of his being such must usually be given to warrant the reading of his entries. *Short v. Lee*, 2 J. & W. 490; and see *Bullen v. Michel*, 2 Price, 399; *Manby v. Curtis*, 1 Price, 229; *Illingworth v. Leigh*, 4 Gwill. 1618. But where a charter of incorporation required the appointment of two proctors annually to receive tithes, it was held that their accounts, coming out of the archives of the corporation, were admissible. *Short v. Lee*, 2 J. & W. 490.

Evidence to prove a farm modus must show that the farm was an ancient one. *Stuart v. Greenall*, 9 Price, 112.

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and containing a memorandum by a former vicar, as to his gathering tithes in kind from some, and agreeing with others, has been admitted as evidence for a succeeding vicar (*m*).

- * 1425 * The vicar's books have also been received in evidence to show that money payments made in lieu of tithe were regulated by the poor's rate (*n*).

Custom of other parishes.

The custom of tithing in other parishes is not admissible (*o*). Where the plaintiff on a bill for tithes in kind alleged that he was entitled to such tithes in the townships *A.* and *B.* and offered evidence of payment of such tithes throughout the rest of the parish, it was doubted whether such evidence was admissible; and the Court decided in favour of the claim on other grounds (*p*).

Reputation.

Reputation and traditionary evidence are also admissible (*q*), subject to the rules already adverted to (*r*). Such evidence must be general in its nature, and is inadmissible for the purpose of proving a particular fact (*s*).

Lands of dissolved monastery.

Next, it is a good defence to show that the lands belonged to a monastery dissolved by one of the statutes 31 H. 8. c. 13; 32 H. 8. c. 24 (*t*), which held the * land dis-

* 1426

(*m*) *Drake v. Smyth*, 5 Price, 369.

(*n*) *Walter v. Holman*, 4 Price, 171.

(*o*) *Erskine v. Ruffle*, Gwill. 964.

(*p*) *Travis v. Chaloner*, Gwill. 1237.

(*q*) *Stransham v. Cullington*, Cro. Eliz. 228; *Congley v. Hall*, 2 Roll. R. 125. See *Morley v. Davies*, 11 Price, 162. Per Wood, B. Evidence of reputation of payments in lieu of tithes is entitled to respect. *Robinson v. Williamson*, 9 Price, 139.

(*r*) *Supra*, Vol. I. p. 59; *Supra*, p. 1208.

(*s*) *Harwood v. Sims*, 1 Wightw. 112; Vol. I. p. 63. In *Chatfield v. Fryer*, 1 Price, 253, where the defendant contended that lands called the Miles had been given to the rector in lieu of tithe upon *Acre Fen*, and proof was given that tithe had never been paid for *Acre Fen*, the Court of Exchequer (Wood, B. *dissentiente*) held that a deposition stating that the deponent had heard many old people declare that the Miles had been given to the vicar in lieu of tithes was inadmissible. It is to be observed, that in that case no evidence was given of possession of the Miles by the vicar, but that, on the contrary, it appeared that it was in the possession of a person who was not shown to have derived his title from the rector.

(*t*) These statutes continued the exemption in the grantee which was before enjoyed by the monastery. Hence, if a monastery seized of lands and a rectory, had paid no tithes within memory, such lands also are exempted on the ground of a perpetual unity of possession, for they could not pay tithe to themselves, *Clavill v. Deane*, Gwill. 1354; *Slade v. Drake*, Hob. 295. Gwill. 390. And if the unity be proved, the presumption will be in favour of the ex-

charged from tithes by prescription, or the Pope's bull, or composition real, or by the privilege of a particular order.

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The fact that the lands belonged to a monastery is usually proved by means of the survey taken at or soon after the time of the dissolution, or other public documents, most of which are deposited either in the augmentation-office or chapter-house.

Lands of a dissolved monastery.

Mere proof that the lands belonged to such a religious house is *prima facie* evidence that they immemorially held it so discharged (*u*). A presumption which cannot exist unless the monastery itself was founded before the time of legal memory.

2dly. The exemption may be established by evidence of the Pope's bull, which, as has been seen, must be proved by the production of the bull itself, or an exemplification of it under the bishop's seal.

3dly. By evidence that the lands belonged to a privileged order, as the Templars, Cisterians, and Hospitallers, before the council of Lateran in the year 1215; for the stat. 2 H. 4. c. 4, operated to prevent such orders from acquiring further exemptions, but left those untouched which existed before that council (*x*). But if the lands have paid tithes, a presumption will arise that they were purchased after that time (*y*). This privilege, * however, extends no farther than to lands in the possession of a tenant in fee, or in tail (*z*); a lessee for life or years, unless he hold immediately from the Crown, is chargeable for such lands during his occupation (*a*). * 1427

Barren lands newly inclosed are also exempted from tithe (*b*) for the space of seven years. This is matter of proof on the part of him who claims the exemption (*c*). The question in such cases is, whether the land be *suapte*

emption; this is therefore in effect a discharge by prescription. See Sav. 62; Hob. 296. The exemptions do not extend to lands which came to the crown by the stat. 27 H. VIII. c. 28, which dissolved the lesser abbeys; or by the 1st Ed. VI. c. 14. 2 Co. 47; *Fosset v. Francklin*, T. Ray. 225.

(*u*) Hob. 300. But where it appeared that the lands were in lay hands shortly before the Dissolution, it was held that the exemption could not be supported. *Page v. Wilson*, 2 J. & W. 524.

(*x*) Toller on Tithes, 173; 3 Burn's Ecc. L. 403, 5th ed.

(*y*) *Lord v. Turk*, Bunb. 122.

(*z*) *Wilson v. Redman*, Hardr. 174; Peake's L. E. 446.

(*a*) Owen, 46.

(*b*) 2 & 3 Edw. VI. c. 13, s. 5.

(*c*) *Lord Selsea v. Powell*, 6 Taunt. 297.

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natura sterilis (d), or, according to Lord Coke, be not apt for tillage (e). The object of the act was to encourage agriculture (f); and therefore although the land produce some fruit it may still be barren within the meaning of the Act, for no land is so steril that it will not with the aid of labour and pains produce something. On the other hand, no land is so fertile as to yield titheable fruit spontaneously. The question therefore seems to be, whether the land in its natural state be so barren and ungrateful, so unapt for tillage, as to require an extraordinary expense, either in manure or labour to subdue its evil qualities, and reduce it to a proper state of cultivation (g).

Custom of
tithing.

* 1428

If the plaintiff declare for a tenth, but it turn out * that by the custom he is entitled to an eleventh part only, he cannot recover (h). But he does not lose his common-law right unless the custom or modus be found by the Jury (i). Where the plaintiff declared for the tenth, but gave in evidence a terrier, which showed that he was entitled to an eleventh only, and the witnesses on both sides proved different money payments by way of composition, but the custom of tithing was not left to the Jury, it was held that the evidence was not a ground of nonsuit, and that no modus or custom being established the plaintiff was entitled to the common-law tithe.

Whether tithes have been regularly set out is of course a question of law. At common law, grass is titheable in grass cocks, after having been tedded in the process of making it into hay (k). And wheat is titheable in the sheaf and not in the shock (l); and the parishioner must leave his nine parts in the field a reasonable time to enable the parson to compare his tithe with them (m). But

(d) 2 M. & S. 358.

(e) 2 Inst. 656.

(f) B. N. P. 191; 1 Ves. 117.

(g) *Warwick v. Collins*, 2 M. & S. 349; 5 M. & S. 166; *Lord Selsea v. Powell*, 6 Taunt. 297. And see 2 Inst. 656; *Witt v. Buck*, 3 Bulst. 166; *Stockwell v. Terry*, 1 Ves. 117; *Jones v. Le David*, 4 Gwill. 1336; 1 Freem. 335; *Dyer*, 170, b.; *Sherington v. Fleetwood*, Cro. Eliz. 475; *Byron v. Lamb*, 4 Gwill. 1594; *Com. Dig.* Dismes, H. 15.

(h) See *Blundell v. Maudesley*, 15 East, 641.

(i) *Ibid.*

(k) *Newman v. Morgan*, 10 East, 5; *Halliwell v. Trappes*, 2 Taunt. 55.

(l) *Halliwell v. Trappes*, 2 Taunt. 55; *Shallcross v. Jowle*, 13 East, 261. As to hops, see *Knight v. Halsey*, 7 T. R. 86; 2 B. & P. 172; *turnips, Blaney v. Whitaker*, cited 10 East, 12.

(m) *Ibid.*

the common-law mode of setting out tithes may frequently be shown to be varied by proof of a particular custom. As a custom throughout the parish for the parson to take only the eleventh shock of wheat in consideration of the farmer putting sheaves into shocks, and in bad weather opening them to dry (*n*); but to support such a custom proof of consideration is necessary. A custom to set out only the eleventh cock of barley, without proof * that the farmer did any thing for the benefit of the parson, but only for the benefit of the whole crop previous to the tithing, was held to be bad (*o*). So, although clover-hay be titheable in the cock and not in the swathe, yet, where by the particular course of husbandry it is not put into cocks, it may be set out in the swathe (*p*). Although the statute of Ed. 6. be penal in its nature, the proof of a custom to take less than the tenth will not avail the defendant, unless it be valid in law (*q*).

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IV.

Custom of
tithing.

* 1429

Where the issue is on any custom, all those who are interested in either establishing or defeating the custom are incompetent to further such interest by their testimony (*r*).

Competency.

In an ejectment against the lessee of tithes, after a determination of the lease by notice, proof must be given of possession after the expiration of the notice. This fact may be established by means of the rule to defend (*s*), as also by evidence that upon a demand made after the expiration of the notice the defendant refused, or was silent (*t*). Notice to quit at one time is waved by a subsequent notice to quit at a later term (*u*). Provided evi-

Ejectment.

(*n*) *Smyth v. Sambrook*, 1 M. & S. 66.

(*o*) *Ibid*.

(*p*) *Collyer v. Howse*, 2 Anst. 481; *Baker v. Athill*, 2 Anst. 491.

(*q*) *Phillips v. Davies*, 8 East, 178. Where the appellant against a summary proceeding for tithes under the statute 7 & 8 W. 3. c. 6, s. 1, appeared before the justices, but offered no evidence of a modus, held that such evidence was properly rejected by the justices at Sessions. *R. v. Jeffereys*, 1 B. & C. 604.

(*r*) *Supra*, 391. Where the question was as to the payment of tithe-wood in the weald of Kent, all those who as owners or farmers who were entitled to any wood there were held to be incompetent. *Earl of Clanricard v. Lady Denton*, Gwill. 360. The lessee of a vicar, after releasing the vicar, is competent; for he cannot sue the occupiers. *Robinson v. Williamson*, 9 Price, 140.

(*s*) See the rule, *supra*, 541.

(*t*) *Doe v. Palmer*, 16 East, 53.

(*u*) *Ibid*. (*i. e.*) if given with intent to wave the first notice. See *Doe v. Humphreys*, 2 East, 237.

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IV.

dence be given to show that a grant existed, it is not essential to produce it any more than in the case of a composition real (x).

* 1430

TREASON.

At common law, one witness was sufficient in the case of treason, as well as on any other capital charge; but by the stat. 7 Will. III. c. 3, and various other statutes (y), two witnesses are essential, either both to the same overt act, or one of them to one, and the other of them to another overt act of the same treason. But the stat. 7 Will. III. c. 3, does not require that each overt act shall be proved by two witnesses, but that the treason shall be so proved, there being one witness to one overt act, and another witness to another overt act of the same species of treason (z) (1).

Overt acts.

It is sufficient if any one overt act be proved as it is laid to have been committed within the county; the precise time and place are immaterial (a) (2).

Letters are evidence to prove overt acts, although the substance and purport only are set forth in the indictment (b).

If an overt act be alleged, with circumstances which are
* 1431 not essential to the particular species of treason * charged,

(x) *Supra*, 1415; *Bennett v. Neale*, Wight. 324; *Chatfield v. Fryer*, 1 Price, 253; *Heathcote v. Matmaring*, 3 Bro. C. C. 217.

(y) 1 Edw. VI. c. 12; 5 & 6 Edw. VI. c. 11, s. 12; 1 & 2 Phil. & Mary, c. 10.

(z) Lord *Stafford's* case, 3 St. Tr. 204; Fost. 235, 7. Case of the *Regicides*, Kel. 9; East's P. C. 129. And the stat. 7 Will. III. c. 3, expressly enacts and declares, that if two or more distinct heads or kinds of treason be alleged in the same indictment, one witness to prove one of the said treasons, and another witness to prove another of the said treasons, shall not be deemed to be two witnesses of the same treason within the meaning of the act.

(a) *Charnock's* case, 4 St. Tr. 570. *Townley's* case, Fost. 8, 9; 3 Inst. 230; 1 Hale, 361; 2 Hale, 179, 291; Kel. 16. *Ld. Balmerino's* case, Dom. Proc. 9 St. Tr. 607; East's P. C. 125.

(b) *Coleman's* case, 2 St. Tr. 661. Lord *Preston's* case, 4 St. Tr. 411. *Staley's* case, 2 St. Tr. 655. *Francia's* case, 6 St. Tr. 73. *Layser's* case, 6 St. Tr. 330. *Watson's* case, 2 Starkie's C. 116.

(1) [See Const. of U. States, Art. III. Sect. 3.]

(2) [In indictments for treason, it is not necessary that the offence should be proved to have been committed on the day, or that the number of the insurgent party was so great as the indictment states. *United States v. Vigil*, 2 Dallas, 347.]

they may be rejected as surplusage. Thus, if the overt act of treason in levying war be alleged to be an arraying in a hostile manner, and thereby killing divers of the King's subjects, if the arraying in a hostile manner be proved, that will be sufficient, without proof of the rest (c).

Although one overt act at least must be proved as laid to have been committed within the county, yet, after such an act has been proved, evidence may be given of any other overt acts of the same species of treason committed in other counties, for the purpose of explaining the object and intention of the overt act proved within the county (1). Thus, in *Sir H. Vane's* case, the treason charged was a compassing of the King's death, and a levying of war in Middlesex was alleged as an overt act, and it was held that a levying of war in Surry might be given in evidence; for not being laid as the treason, it was a transitory thing, which might be proved in another county (d).

Traitorous
intention.

An overt act of treason may be in itself, and unconnected with the traitorous intention of the actor, purely innocent. Thus, in *Lord Preston's* case (e), the mere taking boat in Middlesex was held to be an overt act of treason within the county, being proved to have been done with an intention of going to France for the purpose of inciting foreigners to invade the kingdom (2).

(c) *Fost.* 194; 1 *Hale*, 122. *Lowick's* case, 4 *St. Tr.* 722. *Layer's* case, 6 *St. Tr.* 329, 330.

(d) *Sir H. Vane's* case, *Kel.* 14, 15. *Layer's* case, 6 *St. Tr.* 260.

(e) 4 *St. Tr.* 477; *Fost.* 196.

(1) [If the overt act be not proved by two witnesses, so as to be submitted to the jury, all other testimony is irrelevant and inadmissible. *United States v. Burr*, 4 *Cranch*. 506. *Robinson's* Report of *Burr's* Trial, Vol. II. 443. The accused can be convicted only upon the overt act laid in the indictment: If other overt acts can be inquired into, it is for the sole purpose of proving the particular fact charged. 4 *Cranch*, 493. 2 *Robinson*, 428. See also *United States v. Malin*, 1 *Dallas*, 33.]

(2) [In an indictment for treason, the overt act laid was, taking a commission from *Sir William Howe*: Evidence was offered to show that the prisoner had a power of granting passes into and out of the city at that time in possession of the enemy. It was held that the evidence ought to be received—but not as conclusive proof of the defendant's having received a commission. *Respublica v. Cartledge*, 1 *Dallas*, 35. It having been proved that the defendant had enlisted in the enemy's army, it was held that evidence, to show that the defendant had attempted to prevail on another to enlist, was admissible to show *quo animo* the defendant himself had joined the enemy's forces. *Respublica v. Roberts*, 1 *Dallas*, 39. Where the prisoner had joined a party of American

PART
IV.Traitorous
intention.

* 1432

For the purpose of proving the traitorous intention, overt acts of treason, although not laid in the indictment, are admissible evidence. In *Layer's case* (f), * a conspiracy to depose, and to place the pretender on the throne, being laid as an overt act, a corresponding with the pretender, although made an overt act of treason by the stat. 12 & 13 Will. III. was held to be admissible, as directly tending to prove the overt act laid.

And in *Rookwood's case* (g), where, upon a charge of treason in compassing the King's death, a meeting and consultation to waylay him was alleged as an overt act, as also an agreement to provide forty men for that purpose, it was

(f) 4 St. Tr. 286, 7. See also the cases of *Deacon*, Fost. 9; and *Sir J. Wedderburn*, ibid. 22. In Mr. East's pleas of the Crown it is stated, "On the other hand, if the overt act offered in evidence, and not laid in the indictment, be no direct proof of any of the overt acts charged, but merely go to strengthen the evidence or suspicion of some of those overt acts by a collateral circumstance, such evidence cannot be admitted, notwithstanding the opinion of Ld. Hale to the contrary (1 Hale, 121, 2). As in the case of Capt. *Vaughan*, who was indicted for adhering to the King's enemies on the high seas; the overt act was his cruising upon the King's subjects in a vessel called the *Loyal Clencarty*; and the counsel for the Crown offered to give in evidence that he had some time before cut away the custom-house barge, and gone on a cruising in that vessel; but as that was no proof of his cruising in the *Loyal Clencarty*, the Court rejected the evidence."

It is, however, to be observed, that Ld. Hale merely says, that if an overt act be laid and proved, any other overt acts may be given in evidence to aggravate the crime, and *render it more probable*. By this Ld. Hale does not appear to have meant that any other evidence was admissible than such as was in itself legal evidence to show the real nature and object of the overt act proved. In *Vaughan's case*, the proof of cruising in the custom-house barge no more tended to prove a cruising in the *Loyal Clencarty*, than evidence of a robbing of *A.* on one day tends to establish the robbing of *B.* the day after.

(g) 4 St. Tr. 687.

troops, supposing them to be British, it was held that no evidence of words showing his mistake, and that it was his real intention to join and adhere to the enemy, could be admitted: But it being proved that the prisoner was actually with the enemy at another time, it was held that words, indicating his intention to join them, might be given in evidence to explain the motives upon which that design was afterwards carried into effect. *Respublica v. Malin*, 1 Dallas, 33. These cases were decided before the Constitution of the United States was adopted.

In an indictment for *treason*, evidence is not admissible, that the defendant joined in the commission of a *felony*, for which, as such, he was charged in another indictment. *United States v. Mitchell*, 2 Dallas, 357.]

held that a list of the names of a small party who were to join in the attempt, of which the prisoner was to have the command, with his own name at the head of the list as their commander, was admissible as direct proof of the overt acts laid, although not alleged in the indictment. And it seems that the evidence would also have been admissible, although no agreement to provide forty men had been *alleged, but merely a meeting and consultation to way- * 1433 lay the King (*h*).

The publication of treasonable papers may amount to an overt act of treason (*i*).

Writings found in the prisoner's possession, but not published, if plainly connected by their contents with a treasonable design, are evidence of such design, though not published (*k*). But it seems, that if it be doubtful whether writings found in the possession of the prisoner were connected with the treasonable design charged, they ought not to be read (*l*).

Where the writings are connected with a treasonable object, either by their contents, or by collateral evidence that they were intended to be used in furtherance of that purpose, they may be read, on proof of their having been found in the custody of the prisoner, without proof that they are in his hand-writing (*m*).

(*h*) See *Lowick's case*, 4 St. Tr. 722.

(*i*) East's P. C. 119; Fost. 198.

(*k*) Fost. 198; 4 Bl. Comm. 80. *Gregg's case*, 10 St. Tr. App. 77. *Layer's case*, 6 St. Tr. 279. *Dr. Hensley's case*, 1 Burr. 644. *Tooke's case*, cited East's P. C. 119. *Stone's case*, 6 T. R. 527. If (say Mr. J. Foster and Mr. J. Blackstone) the papers found in Sidney's closet had been plainly relative to the other reasonable practices charged in the indictment, they might have been read in evidence against him. See *Watson's case*, 2 Starkie's C. 141.

(*l*) *R. v. Watson*, 2 Starkie's C. 141.

(*m*) East's P. C. 119. *Layer's case*, 6 St. Tr. 279. So in case of treason or felony, it may be proved that articles were found secreted in the prisoner's house after his apprehension. In *Watson's case* (2 Starkie's C. 137) evidence was admitted that a quantity of pikes had been found secreted in the prisoner's house subsequently to his apprehension. Lord Ellenborough, upon that occasion, cited a case from memory, where a butler to a banker at Malton had been taken up on suspicion of having committed a great robbery; the prisoner had been seen near the privy, and this circumstance having excited suspicion in the minds of the counsel who considered the case during the assizes at York, at their instance search was made, and in the privy all the plate was found; the prisoner was in consequence convicted, no doubt being entertained as to the admissibility of the evidence.

PART
IV.

Traitorous intention.

* In *Watson's* case (n), where writings had been found at the lodgings of one connected by the evidence with the prisoner, as a joint conspirator, but after the apprehension of the prisoner, it was held that they might be read in evidence, although no absolute proof was given of their previous existence; strong presumptive evidence having been given that the lodgings had not been entered by any one in the interval between the time of the prisoner's apprehension and the finding of the papers.

But in *Hardy's* case, where writings were found in the possession of conspirators with the prisoner, but subsequently to his apprehension, it was held, that as there was no evidence to show the previous existence of the writings, or that the prisoner was a party to them, they could not be read.

In cases of this nature, where the offence involves a conspiracy, the declarations, acts and conduct of others proved to have been engaged in the same common design with the prisoner, are usually resorted to for the purpose of proving the illegal and traitorous intention. After proof of an association for such a purpose, all acts done by any of the parties so united in furtherance of the common design, are evidence against the rest (1). Hence, writings sufficiently connected with the general object, which have not been published, but found in the possession of a joint conspirator, are admissible in evidence against the prisoner (o).

Upon this point the same principles and rules are applicable as in ordinary cases of conspiracy (p).

* 1435 * It has been already seen, that for reasons of policy

(n) 2 Starkie's C. 140.

(o) *R. v. Watson*, 2 Starkie's C. 140. And see the cases cited *supra*, tit. *Conspiracy*.

(p) *Vide supra*, tit. *Conspiracy*, *infra*, *Unlawful Assembly*.

(1) [The presence of a party, where presence is necessary to guilt, is part of the overt act, and must be proved by two witnesses. An indictment, charging a person with being present at an overt act of treason, cannot be supported by only proving that the person accused caused the act to be done by others in his absence. No presumptive evidence—no facts from which presence can be inferred, will satisfy the constitution and the law. If proof of procurement be admissible upon a charge of presence, such procurement must be proved in the same manner, and by the same kind of testimony, as would be required to prove actual presence. *United States v. Burr*, 4 Cranch, 499, & *seq.* Robinson's Report of Burr's trial, Vol. II. 435, & *seq.* See also *Ex parte Bollman and Swartwout*, 4 Cranch, 75.]

witnesses in cases of this nature are precluded from disclosing facts the publication of which might be of public detriment (q).

PART
IV.

TRESPASS.

In an action of trespass for an injury to the person, lands, or goods of the plaintiff, the evidence relates,

1. To proof of the possession of the identical lands or goods, 1435.
2. Of the acts of trespass committed directly or indirectly by the defendant against the person, lands or goods of the plaintiff, 1440.
3. To the damages, 1450.
4. To proof of notices of action, 1455.
5. To the defence under the general issue, 1456.
6. Under the plea of *liberum tenementum*, 1464.
7. Right of way, &c. 1466.
8. On issue taken on the replication of *de injuria sua propria*, &c. generally, 1467, and to the pleas of *son assault*, 1472, justifications in *defence of property*, 1475, under a *license*, 1476, under *process*, &c. 1477.
9. On issue taken on a *new assignment*, 1478, or plea of *excess*, &c. 1480.

1. An action of trespass *quare claudum fregit* is local (r), and must be proved to have been committed within the county as alleged. The description of the local situation of the close within a particular parish or township * is also material (s). And where the *locus in quo* is described by its abutments, a variance from the description of any one abuttal in evidence will be fatal (t).

* 1436
Quare clau-
sum fregit.
Possession.

(q) *Supra*, Vol. I. p. 106.

(r) An action will not lie in the courts of this country in respect of a trespass to land abroad. 4 T. R. 503.

(s) *Taylor v. Hoeman*, Moore, 161. Premises laid in the parish of Clerkenwell, proof that Clerkenwell consists of two parishes, although generally known by the name of St. James's, Clerkenwell, held to be insufficient. *Ibid.* And see 5 B. & A. 221.

(t) Thus, if the description be "abutting on the south on the mill of A," the proof of a mill there in the tenure of A. is essential (B. N. P. 89. *Nowell v. Sands*, 2 Roll. Ab. 678). But strict literal proof is not essential; if the description be of a close abutting on the mill of A. it is satisfied by proof of such a mill adjoining, although a highway intervene (B. N. P. 89. *Nowell v. Sands*, 2 Roll. Ab. 678). If the close be described as abutting towards the east, and in fact it abuts towards the north, inclining to the east, it is sufficient. *Roberts v. Kerr*, 1 Taunt. 501.

PART
IV.

Quare clau-
sum fregit.
Possession.

Trespass to lands is an injury to the possession ; and as, on the one hand, it is essential for the plaintiff to prove his actual possession of the premises, his title to that possession is on the other hand wholly immaterial as against a wrong-doer (v).

The mere prior occupancy of land, however recent, will give a good title to the occupier to recover in trespass against all, except such as can prove an older and better title in themselves (u).

So it is no objection that the plaintiff holds under a lease which is void under the stat. 13 Eliz. c. 20, by reason of the non-residence of the lessor (x).

And proof of *title* does not dispense with the proof of actual *possession*. A lessee cannot support the action before entry (y) ; neither can an heir at law * maintain this action against an abater (z) ; nor can a bargainee, although the Statute of Uses transfers the possession (a) (1).

But it is sufficient if he has taken legal possession of part of a farm or estate in the name of the whole, and the *locus in quo* be part of that entire estate. Thus, by his induction, the parson is put in possession of a part for the whole, and may maintain an action for a trespass to the glebe land, although he has not actually taken possession of the whole (b).

(v) The proprietors of a canal, who have erected a dam across a stream with the consent of the proprietors of the land, may maintain trespass against one who injures the dam. *Dyson v. Collick*, 5 B. & A. 601. [See *Ricker & al. v. Kelly & al.* 1 Greenleaf, 117.] But commissioners who erect a wall across a navigable river for the benefit of the public, cannot maintain trespass for throwing it down, for they have no property or possessory interest. *Duke of Newcastle v. Clark*, 2 Moore, 666. [8 Taunt. 602. S. C.]

(u) *Catteris v. Couper*, 4 Taunt. 547.

(x) *Graham v. Peat*, 1 East, 244.

(y) *Cook v. Harris*, 1 Ld. Raym. 367.

(z) Com. Dig. tit. *Trespass*, B. 3 ; 2 Roll. Ab. 553. Yet where the ancestor dies seised, and the possession is vacant, the law casts the seisin upon the heir.

(a) Com. Dig. tit. *Trespass*, B. 3 ; 1 Ventr. 361.

(b) *Bulwer v. Bulwer*, 2 B. & A. 470. So, it should seem, if li-

(1) [Where the plaintiff purchased a tract of land, sold under an execution on the 10th of Nov. 1804, but the conveyance was not made until the 18th of July, 1805, it was held that he could not recover for a trespass committed between those periods, having neither actual nor constructive possession. *McMillan v. Hefley*, 2 Car. Law Repos. 89. But trespass may be supported, in North Carolina, by the owner of wild lands, although he is not in actual possession. *Kennedy v. Wheatly*, 2 Hayw. 402.]

PART
IV.Quare clau-
sum fregit.
Possession.

One who has exclusive possession of land, although for a limited purpose, as under a contract for the purchase of a crop of grass growing there, or who is entitled to the vesture or *prima tonsura*, may maintain trespass against any one who enters the close and injures the herbage, although he does it by consent of the owner of the land (c).

So one who has only the herbage of a forest or close may bring trespass, as well as he who has the land (d).

And the owner of the soil of a public way (e), or market (f), may bring trespass against one who makes * any * 1438 use of it extending beyond those privileges which the public possess, without the license of the owner (i).

A judgment in ejectment upon the several demises of two plaintiffs in trespass, was held to be evidence to support the joint action of trespass against two of the defendants in the ejectment (g).

In some instances, parties holding over after the determination of particular estates, are adjudged to be trespassers by the provisions of the stat. 6 Ann. c. 18, s. 5 (h).

very of seisin be given of part for the whole. [See *Gambling v. Prince*, 2 Nott & M'Cord, 138.]

(c) *Crosby v. Wadsworth*, 6 East, 602. If A. covenant that none but B.'s cattle shall be fed in the *locus in quo*, B. may maintain trespass against strangers, and may distrain A.'s cattle damage-feasant (*Burt v. More*, 5 T. R. 333). So, if J. S. agree with the owner of the soil to plough and sow the ground, and give him half the profits, he may have an action for treading down the corn, and the owner is not jointly concerned in the growing corn. B. N. P. 85. [See *Fbote v. Colvin*, 3 Johns. 216.]

(d) [See *Clap v. Draper*, 4 Mass. Rep. 266. *Inhabts. of Rehoboth, &c. v. Hunt*, 1 Pick. 224. *Inhabts. of Worcester v. Green*, 2 Pick. 425. *Stultz v. Dickey*, 5 Binney, 285.] 2 Roll. Ab. 549, H. p. 1. The purchaser of a growing crop of grass sold under a distress who has nailed up the gates, and made the grass into hay, may maintain trespass against the sheriff for the acts of his bailiff in entering and levying under a *fi. fa.* *Tompkinson v. Russel*, 9 Price, 287.

(e) *Sir John Lade v. Shepherd*, Hil. 8 Geo. II. cited 1 Wils. 110. And see 1 Roll. Ab. 549, H. pl. 1; 1 Roll. Ab. 406, pl. 7.

(f) *Mayor of Northampton v. Ward*, 1 Wils. 107.

(g) *Chamier v. Clingo*, 5 M. & S. 64; *supra*, 545.

(h) Which enacts, that every person, who as guardian or trustee for an infant, and every husband seised in right of his wife only, and every other person having an estate determinable upon life, who after the determination of that estate or interest, without the express consent of the person immediately entitled upon the deter-

(1) [*Robbins v. Borman & al.* 1 Pick. 122. *Stackpole & al. v. Healy*, 16 Mass. Rep. 33. *Perley v. Chandler*, 6 Mass. Rep. 454. *Makepeace v. Worden & al.* 1 N. Hamp. Rep. 16. *Cortelyou v. Van Brundt*, 2 Johns. 357. *Jackson v. Hathaway*, 15 Johns. 447. *Peck v. Smith*, 1 Conn. Rep. 103. *Chambers v. Furry*, 1 Yeates, 167, *acc.*]

PART
IV.Trespass to
chattels personal.

In an action for trespass to a personal chattel, the plaintiff may either show actual possession, or prove his title in law to the possession; for in construction of law the right of property draws after it the possession (i). If he has the actual possession, his title, as against a mere wrong-doer, is immaterial.

* 1439 In this respect the action of trespass differs materially * from that of trover; the former is founded on possession, the latter on property (k).

Trespass to
chattel.

If a party hire a chariot for the day, appoint the coachman, and furnish the horses, he may be described as the owner and proprietor, and may maintain an action for an injury to the carriage whilst it is in his possession (l).

So he may show a *legal right* to the chattel vested in him, although he has never had the *actual possession*; as that he is entitled, as lord of the manor, to the property as a wreck or estray, although there has been no seizure (m); or that he is entitled as executor where the trespass was committed before probate; for the right accrues under the will, and the probate is merely evidence of it (n).

If *A.* gratuitously permit *B.* to use his carriage, *A.* still remains in legal possession, and may maintain trespass

mination, holds over and continues in possession of any lands or tenements, shall be adjudged to be trespassers, and every person so immediately entitled, or his executors or administrators, may recover in damages, against the person holding over, the full value of the profits received during the wrongful possession.

(i) Bro. tit. *Trespass*, pl. 303. *A.* covenants to build a bridge, and to keep it in repair, for the use of the public, the property in the materials remains in the hands of *A.* and he may maintain trespass against a wrong-doer who removes them. 6 East, 154.

Where a sheriff seizes goods under a *f. fa.*, the property remains in the owner till execution executed, as well after the Statute of Frauds as before. The meaning of the words "that the goods shall be bound from the delivery of the writ to the sheriff" is, that after the writ is so delivered, if the defendant make an assignment of the goods, except in market overt, the sheriff may take them in execution. Per Ld. Hardwicke, 2 Eq. Ca. Ab. 381; B. N. P. 91. [See Yelv. 44, note (1). *Churchill v. Warren*, 2 N. Hamp. Rep. 209. *Folsom v. Chesley*, *ibid.* 432.]

(k) Per Lord Kenyon, C. J. in *Ward v. Macaulay*, 4 T. R. 490. And see further, as to the distinction between trespass and trover, *Cooper v. Chitty*, 1 Burr. 20; 1 Bl. Rep. 65. *Smith v. Milles*, 1 T. R. 475.

(l) *Croft & another v. Alison*, 4 B. & A. 590. [*Boynton v. Turner*, 13 Mass. Rep. 391.]

(m) *Smith v. Milles*, 1 T. R. 480; F. N. B. 91.

(n) 1 T. R. 480; 2 Bulst. 268.

for an injury done to the carriage whilst it is used by *B.* (o).

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IV.

So if *A.* deliver to *B.* a box to be kept, and *B.* break it open and convert the goods, trespass lies (*p*).

But the owner cannot maintain trespass for taking his goods where he is not entitled to the possession. Thus, a landlord having let his furniture to a tenant cannot maintain trespass against the sheriff for taking the goods in execution (*q*).

Possession.

* The plaintiff declaring for trespass to goods, chattels * 1440 and effects, may recover in respect of fixtures (*r*).

2dly. Evidence of the acts of trespass committed against the person, lands, or goods of the plaintiff; relates to the time and number of such acts, the place, or to the nature and manner of the act.

Assault.
Several
trespasses.

It is universally true, that the plaintiff may prove as many distinct trespasses as there are counts in the declaration, and that the day laid in every count which alleges a single act of trespass is immaterial. If the declaration for an assault and battery contain but one count the plaintiff cannot give evidence of more than one battery (*s*); and after proof of one, he cannot wave it and prove another (*t*). And if the declaration contain two counts, and the defendant suffers judgment by default on one, and pleads not guilty to the other, and on the trial one trespass only be proved, the defendant will be entitled to a verdict (*u*) (1).

(o) *Lotan v. Cross*, 2 Camp. 464. Otherwise if he had let the carriage for a time. *Ibid*.

(p) *B. N. P.* 83; *Moor*, 248.

(q) *Ward v. Macauley*, 4 T. R. 489. [*Clark v. Carlton*, 1 New Hamp. Rep. 110. *Putnam v. Wyley*, 8 Johns. 432.] Where a ship was seized forfeited under the Navigation Act (12 Car. II. c. 18), by the governor of a British colony, it was held that trespass could not be maintained against the party who seized the ship, although he did not proceed to condemnation; for by the forfeiture the property was divested out of the owner. *Wilkins v. Despard*, 5 T. R. 112.

(r) *Pitt v. Shew*, 4 B. & A. 206.

(s) *Stante v. Prickett*, 1 Camp. 473. Trespass for assault and false imprisonment may be laid *diversis diebus et vicibus*. *Burgess v. Freelove*, 2 B. & P. 425. But a declaration, alleging that the defendant, on such a day, and on divers other days and times, made an assault, &c. was held to be bad on special demurrer. *English v. Purser*, 6 East, 395.

(t) *Ibid*.

(u) *Compere v. Hicks*, 7 T. R. 727.

(1) [If the declaration in trespass allege an injury to have been
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IV.

Assault.

Several
trespasses.

* 1441

To lands.

So, if the declaration contain two counts, and there be a justification pleaded to one of them, which is admitted by the replication, the plaintiff cannot recover, unless he show that two trespasses were committed.

A declaration against *A.* and *B.* contained two counts; the defendants pleaded the general issue, and * a justification to one count. The replication, admitting the arrest to be lawful, alleged that *B.*, with the consent of *A.*, after the arrest, released the plaintiff, and afterwards imprisoned him for the time mentioned in the second count. The plaintiff having failed to prove the consent of *A.*, it was held that he could not prove the same trespass against *B.* on the second count (x).

Trespasses to land are usually alleged to have been committed on a day specified, and on divers other days and times between that day and the commencement of the action; and under such an allegation the plaintiff may prove any number of trespasses committed within that space of time, or one single act of trespass previous to the day first mentioned (y) (1).

(x) *Atkinson v. Matteson*, 2 T. R. 172.

(y) B. N. B. 86. Per Holt, C. J. 4 Ann. at Hertford, 2 Str. 1095; 2 Salk. 639. *Hume v. Oldacre*, 1 Starkie's C. 351. A very learned person has intimated a doubt whether any number of trespasses may not be given in evidence, all anterior to the day first named. It seems, however, to be a general principle, that where the plaintiff has by his own description limited the extent of the injury complained of, he cannot go beyond that description in his evidence; and where a particular space of time is thus assigned for the trespasses, it seems to operate by way of description, and not as a mere formal allegation of time. It is, nevertheless, competent to the plaintiff to *waive his continuando*, and to prove a single act of trespass anterior to the day first mentioned; for the allegation of trespasses on other days than the one first named cannot, it seems, place him in a worse situation than if one trespass only had been alleged; and this was so held in *Wilson v. Powell*, Skinn. 641; B. N. P. 86; Co. Litt. 263. The practice on this subject appears to have been formerly much more strict. See Clayt. 141, pl. 256; Ibid. 5, pl. 8; Vin. Ab. Ev. R. b. 15, 16; Leon. 302, pl. 416; Tri. per Pais, 199. It was even held, that if the plaintiff could not prove the trespass on the first day, he could not prove trespasses on the *diversis vicibus* afterwards. *Walker v. Dawson*, Clayt. 141, pl. 256. [*Supra*, 356.]

committed on the same day, on a horse and a cow, evidence of a trespass on different days is not admissible. *Sanders v. Palmer*, 1 M'Cord, 165.]

(1) [In *Pierce v. Pickens*, 16 Mass. Rep. 470, in trespass *quare clausum fregit*, alleged to have been committed *diversis diebus et vicibus*, it was decided that if the plaintiff give evidence of one or more acts of trespass within the days specified, he shall not be per

If in an action against *A.* and *B.* the plaintiff proceed for several trespasses, but cannot show that **A.* and *B.* were concerned in all of them, he must either elect to proceed on those only which they committed jointly, or if he choose to proceed in respect of any trespass committed by *A.* alone, *B.* will be entitled to a verdict of acquittal (*z*). And it seems, that after proving one trespass in which *A.* alone is implicated, the plaintiff cannot waive it, and prove a trespass committed by both (*a*). For the Jury cannot award separate damages, neither can they award joint damages in respect of a trespass committed by *A.* alone. But in respect of a trespass jointly committed by *A.* and *B.*, the Jury may estimate the damages according to the conduct of the most culpable (*b*); for this is the measure of

(*z*) *Sedley v. Sutherland*, 3 Esp. C. 202. [See Style, 153, *Cutworth's case*.]

(*a*) *Ibid.* [See *White v. McNeily*, 1 Bay, 11. *Chanet v. Parker*, 1 Rep. Con. Ct. 333.]

(*b*) *Brown v. Allen & another*, 4 Esp. C. 158.

mitted to prove an act done at any other time; but if he choose, he may waive his right to prove any act within the days mentioned in his declaration, and may prove one done at any time before the commencement of the action, and within the time prescribed by the statute of limitations.

Originally every declaration in trespass seems to have been confined to one single act of trespass. When the injury was of a kind that could be continued without intermission from time to time, the plaintiff was permitted to declare with a *continuando*, and the whole was considered as one trespass. In more modern times, in order to save the trouble and expense of a distinct writ or count for every different act, the plaintiff is permitted to declare for a trespass on divers days and times between one day and another; and such a declaration is considered as if it contained a distinct count for every different trespass. But as this is for the advantage and ease of the plaintiff, he is not obliged to avail himself of the privilege, and may still consider his declaration as containing one count only, and as confined to a single trespass—in which case the time becomes immaterial. As it would give the plaintiff an undue advantage, if he could avail himself of the declaration in both these modes, and might operate as a surprise on the defendant—the plaintiff must make his election before he begins to introduce his evidence. Per Jackson, *J. Ibid.*

From the case of *Haak v. Breidenbach*, 3 Serg. & Rawle, 206, it seems that in trespass with a *continuando*, the plaintiff may waive the *continuando* and prove a trespass at any time before action brought, or may give evidence which goes only to part of the time laid in the *continuando*. See *Jorlison v. Pierpont*, Anthon's N. P. 42, where it is said that if trespass is laid with a *continuando*, the plaintiff may give evidence of divers acts of trespass within the *continuando*; but if he travels out of it, he must select one and rest upon that.]

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IV.

damage sustained by the plaintiff, and there can be no apportionment.

Trespass to the person, &c.

An action of trespass *quare clausum fregit*, it has been seen, is local; but an action for an assault or battery of the person, or false imprisonment, or trespass to personal chattels, is transitory in its nature, and a variance from the place or county will not be material (c), unless it be made so by the provisions of a particular statute (d), or by a plea of local justification (e).

* 1443

Manner of the injury.

But if a count in trespass *quare clausum et domum fregit* allege also a taking of goods in that close or house, it seems that this so far operates by way of * description, that if the plaintiff failed in his proof of the local trespass, he would also fail as to the trespass to the goods (f).

In all actions of trespass, the nature of the complaint renders it necessary to show that the injury resulted from force applied by the defendant, or one acting by his authority. Where the injury is merely consequential to the act, the proper remedy is by an action on the case (g) (1).

If A. throw a log in the highway, and it hits B., he may

(c) *Mostyn v. Fabrigas*, Cowp. 161. [*Watts v. Thomas*, 2 Bibb, 458. *Redgrave v. Jones*, 1 Har. & M'Hen. 195.]

(d) As under the stat. 21 Jac. I. c. 12, s. 5; *supra*, 800. The 23 Geo. III. c. 70, s. 34, in case of actions against officers of excise; 24 Geo. III. c. 47, s. 35, in cases of actions against officers of the customs.

(e) B. N. P. 92. As where the defendant pleads that he took goods damage-feasant, in which case he must ascertain the place at his peril. *Ib.*

(f) See *Smith v. Miles*, 1 T. R. 475; and the observations of Buller, J. there. Yet in the case of an indictment, a prisoner, it seems, may be convicted of a larceny of the goods upon a count for burglary, alleging a burglarious stealing of the goods, although the prosecution should fail as to the burglary from want of proof or variance. The effect of considering such a variance to be fatal in an action of trespass is to multiply counts. See tit. *Variance*.

(g) B. N. P. 26. In some instances a party may elect to bring either trespass or case; as for assaulting and debauching a wife, daughter, or servant (*Bennett v. Alcott*, 2 T. R. 166; *supra*, 1306). Where the defendant seized and detained a ship, and prevented the voyage, Holt, C. J. held that the latter might either declare in case for the consequential damage, so as to recover for his own particular loss, or might have declared in trespass upon his possession. *Pitts v. Gaince*, 1 Salk. 10.

(1) [See Vol. II. 357, note (1).]

maintain trespass; but if, as it lies there, *B.* falls over it and receives an injury, the remedy is case (*h*).

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And if the injury result from actual force, the intention of the defendant is usually immaterial. Thus, if *A.* accidentally drive his carriage against that of *B.* (*i*), the remedy is by trespass, and not case.

Manner of
the injury.

If *A.* wilfully run his vessel against *B.*'s, the latter may bring trespass; but if *A.* so negligently steer * his vessel * 1444 that it runs foul of *B.*'s, case is the proper form of action (*k*).

Where *A.* threw a lighted squib, which fell on the stall of *B.*, who, to protect his own property threw it away, and it fell on the standing of *C.*, who again in his own defence threw it away, and it hit the plaintiff and put out his eye; it was held that all these acts were to be regarded as the acts of *A.* the prime mover (*l*).

Where a defendant has a right to do a particular act, but does it in an improper manner, so as to be injurious to the plaintiff in its consequences, case is the proper remedy. As where *A.* having a right to enter upon the yard of *B.* and to erect a spout there, does it in such a manner that it discharges rain-water upon the premises of *B.* to the injury of his house (*m*).

(*h*) 1 Str. 636. Per Ld. Kenyon, in *Day v. Edwards*, 5 T. R. 649. [See *Legaux v. Feasor*, 1 Yeates, 586. *Smith v. Rutherford*, 2 Serg. & Rawle, 358. *Taylor v. Rainbow*, 2 Hen. & Mun. 423. *Percival v. Hickey*, 18 Johns. 257. *Cotteral v. Cummins & al.* 6 Serg. & Rawle, 343.]

(*i*) *Leame v. Bray*, 3 East, 599. So if he drive it against one in which *B.* is sitting to the injury of his person, although the latter carriage was not his property, nor in his possession. *Hopper v. Reeve*, 7 Taunt. 696. 1 Moore, 407. In *Wakeman v. Robinson*, 1 Bing. 213, it was doubted whether, if the accident happen entirely without default on the part of the defendant, the action be maintainable. In that case the action was brought for an injury to the plaintiff's horse, from the defendant's gig-horse, driving against it; the evidence was, that the accident was occasioned by the default, though not the wilful default, of the defendant; and the Judge advised the Jury that it was not material whether it were wilful or accidental; the Court, after a verdict for the plaintiff, refused a new trial. See *Croft v. Alison*, 4 B. & A. 590.

Where a distress is made after tender of rent, the plaintiff may waive the trespass and bring case. *Branscomb v. Bridges*, 1 B. & C. 145.

(*k*) *Ogle v. Barnes*, 8 T. R. 188.

(*l*) *Scott v. Shepherd*, 3 Wils. 403. This is cited as an extreme case, the authority of which is doubtful. See 5 Taunt. 534.

(*m*) *Reynolds v. Clarke*, 1 Str. 634. It was assumed by Rey-

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IV.

Trespasser
ab initio.

Manner of the
injury.

Where, however, the law, and not a private party, gives a license to do a particular act, and the party abuses that license by a subsequent unlawful act, he becomes a trespasser *ab initio* (n). For where the law gives a general license or authority, it is given conditionally, that it shall be used for that purpose only * 1445 * for which the law allows it; and the law judges of and infers the original intention of the party from his subsequent act. But where a private party authorizes a particular act, he cannot, for any subsequent cause, punish in respect of that which was done by his own license (o).

If therefore any one enter a common inn or tavern, and then commit a trespass, as by carrying any thing away (p); or if the lord who distrains for rent, or the owner for damage-feasant, use or kill the distress, he is a trespasser *ab initio* (q). But a party cannot be made a trespasser *ab initio* by mere non-feasance, for that is no trespass; so that the mere refusal to pay for wine at a tavern, or the omission to deliver cattle taken damage-feasant after a tender of amends, will not make the parties trespassers *ab initio* (r). As the matter which makes a defendant a trespasser *ab initio* must always be specially replied (s), this subject need not be further considered in this place.

nolds, J. in that case, that the mere act of fixing the spout was lawful. In the course of the argument, according to the report in *Strange*, a distinction was taken between cases where the act is *prima facie* lawful, and the damage consequential, and those where the act is unlawful in the first instance. That distinction is not to be found in the report of the same case, in 2 Ld. Ray. 1399, and has been denied by Blackstone, J. in *Scott v. Shepherd*, 2 Bl. Rep. 894; 3 Wils. 409; and by De Grey, C. J. S. C. 2 Bl. Rep. 899; 3 Wils. 411. If laying the spout had been in itself an act of trespass, it seems to be clear, that the consequential damage to the house might be alleged and proved in aggravation. See *Courtney v. Collett*, cited 1 Str. 635, 1 Ld. Ray. 272, and *infra*. 1451.

(n) *Six Carpenters Case*, 8 Co. 146. [Lane, 90. Perk. § 190. 191.]

(o) *Six Carpenters case*, 8 Co. 146.

(p) *Six Carpenters case*, 8 Co. 146; Cro. Car. 196; Yel. 96.

(q) 12 E. 4. 8. b.; 8 Co. 146; 9 Co. 11. a.; 1 And. 65.

(r) 8 Co. 146. [See Keilw. 63, b. *Gardner v. Campbell*, 15 Johns. 401. *Waterbury v. Lockwood*, 4 Day, 257.]

(s) Per Buller, J. in *Taylor v. Cole*, 3 T. R. 297; Sir R. Bovy's case, 1 Vent. 211. 217: Where Twisden said, that to set out such matter in the declaration was like leaping before you come to the

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In trespass, all procurers, and aiders and abettors, are principals (t), and are properly described as such. And so is one who was not even privy to the commission of a trespass for his use and benefit, but who afterwards assented to it (u). If one or more of the defendants were not present at the act of trespass, evidence is requisite to show that they commanded (x) it, or *assented to it (y). If the direction was in writing, notice should be given to produce it, as where the action is brought against a sheriff for the act of his bailiff (z). In such an action, it is sufficient for the plaintiff to prove the sheriff's warrant to the bailiff, in order to connect the former with the act of the latter without producing the writ; and it will still be incumbent on the defendant to prove the writ in his own justification (a).

Agency.

* 1446

By agent.

Where the defendant sets legal process in motion by a malicious, false, and unfounded statement, without more, and in consequence the person of the plaintiff is imprisoned, or his property invaded, the remedy is by an action on the case; for the injury results not immediately from the defendant's act. As, where he maliciously charges the plaintiff before a magistrate with felony, or swears to a debt which is not due, upon which the plaintiff is arrested. But where the injury results immediately from the defendant's act, the remedy is trespass. As, where a magistrate maliciously grants a warrant against one for felony, without

Legal process

stile. See also 3 Wils. 20; *Fisherwood v. Cannon*, cited 3 T. R. 297. [*Oystead v. Shed & al.* 13 Mass. Rep. 520.]

(t) Com. Dig. tit. *Trespass*, C. 1; 2 Roll. Ab. 555. [1 Bay, 15.]

(u) 4 Inst. 317; Com. Dig. tit. *Trespass*, C. 1.

(x) It has been said, (2 Phillipps, 188), that a servant would not be a competent witness to prove that he had no authority from the master to do the act; for if the plaintiff recovered, then in an action afterwards brought against himself, by the master, the verdict would be evidence of the measure of damages. But *quære*, for if the plaintiff failed, the witness would still be liable to the plaintiff, who might still bring an action against the witness; and if the plaintiff succeeded, the verdict would show that the defendant in the former action was a wrong-doer, in which case he would not be entitled to recover at all from the witness and co-trespasser. The interest would be the other way. The case essentially differs from that of an action brought against the master for the negligence of the servant. Vide *supra*, 62. 769.

(y) Bro. *Trespass*, pl. 133. 256. 265; 2 Haw. Pl. Cr. 312; 3 Wils. 377. A servant keeping the key of a room knowing that a man is imprisoned therein, is a trespasser. Ib.

(z) *Supra*, tit. *Sheriff*.

(a) *Grey v. Smith and another*, 1 Camp. 387.

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IV.By agent.
Legal process.

any * information laid (b) ; or where a party without warrant delivers another into the custody of a constable on an unfounded charge of felony (c).

If an attorney at the instance of his client sue out process and deliver it, or cause it to be delivered to an officer to be executed, and such process be illegal, both it seems are trespassers (d). And even in such case, where the process is legal, they must plead their justification specially (e) ; for unless a justification be shown, a trespass has been committed ; and if a trespass has been committed, they were the actors, and therefore were principals (f).

Proof of
agency.

* 1448

In order to identify the principal with an agent who commits a trespass, it is not sufficient to prove merely that the agent when he offended had the conduct of his * master's lawful business ; for although a principal is responsible for the negligence of his agent, he is not responsible for his wilful misconduct. If the agent of A. negligently drove the carriage of A. against that of B., the agent would be liable in trespass, and A. would be liable in case for the negligence of his servant (g). But if the agent in such case wilfully drove the carriage of A. against that of B.

(b) *Morgan v. Hughes*, 2 T. R. 225.

(c) *Stonehouse v. Elliott*, 6 T. R. 315.

(d) *Barker v. Braham*, 1 Wils. 368. See 2 Taunt. 400.

(e) A sheriff or his officers may justify under the writ only, although there be no judgment or record to support or warrant such writ ; [*Barker & al. v. Miller*, 6 Johns. 195. *Blackley v. Sheldon*, 7 Johns. 32. *Damon v. Bryant*, 2 Pick. 413.] But if a stranger interpose, and set the sheriff to do execution, he must take care to find a record that warrants the writ, and must plead it ; so must the party himself at whose suit such an execution is made ; per De Grey, C. J. in *Barker v. Braham*, 3 Wils. 376. In that case, the defendant, Braham, obtained judgment by default against the plaintiff, as the administratrix, for 400*l.*, and after levying 150*l.* on the goods of the intestate in the hands of the plaintiff, Norwood, the other defendant, as her attorney, sued out a *ca. sa.* against the plaintiff for the residue, and Norwood delivered the writ to the officer to be executed, and it was executed. The Court set aside the *ca. sa.* ; the plaintiff then brought trespass, and the defendant having pleaded the general issue, it was held that trespass was the proper form of action. And see *Rogers v. Popkin*, 2 Starkie's C. 404. A judgment vacated by the Court is as if it had never been, and is not like a judgment reversed by error. See the observations of De Grey, C. J. 3 Wils. 376 ; 1 Lev. 95 ; *Turnor v. Felgate*, T. Ray. 73 ; Carth. 274 ; 2 Salk. 674 ; 12 Mod. 178 ; 2 Wils. 385 ; 1 Str. 509 ; T. Jones, 215 ; B. N. P. 84.

(f) *Barker v. Braham*, 1 Wils. 368.

(g) *Morley v. Gainsford*, 2 H. B. 441. Yet trespass lies against the sheriff for the act of his bailiff in arresting the wrong person by mistake.

without the assent of *A.*, the latter would not be responsible (*h*).

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Where persons have the execution of a limited authority, and act *ex parte*, trespass lies if they exceed it in fact. Thus, an action lies against commissioners of bankrupts for the seizure of the supposed bankrupt's goods, if he was not in fact a bankrupt within the statutes. So it does against searchers of leather, appointed under the statute 2 J. 1. c. 22, for seizing leather sufficiently dried, and carrying it before officers called triers, although in their judgment it be insufficiently dried (*i*). But where a party acts judicially, trespass does not lie against him in respect of any judicial act, unless it appear that he has exceeded his jurisdiction, although his judgment with reference to the particular circumstances may have been erroneous (*k*).

Judicial acts.

* The steward of a court-baron is a judicial officer, and * 1449 trespass does not lie against him, where his bailiff by mistake seizes the goods of *A.* under a precept commanding him to take the goods of *B.* (*l*).

In an action for a mere assault, the intention is material, and the plaintiff ought to be provided with such evidence as the case affords, to show that the defendant intended to do him bodily harm (*m*). Every battery includes an assault, and if the plaintiff declare for both, he may recover for an assault only (*n*).

Intention.

In an action for false imprisonment, it is essential to prove that the defendant has by his act deprived the plaintiff of his personal freedom for some portion of time, however short. It has been said that bare words, without laying hold of the person of the plaintiff, and actually confin-

Trespass to the person.

(*h*) *Macmanus v. Crickett*, 1 East, 106; and see *Savignac v. Roome*, 6 T. R. 125; *Tripe v. Potter*, cited 6 T. R. 128.

If the defendant's servant in driving his master's carriage wantonly strike the horses of the plaintiff, in consequence of which the carriage of the plaintiff is injured, the defendant is not responsible; but if the servant so strike, although injudiciously, in the course of his employment, and in furtherance of it, the defendant is liable in case. *Croft v. Alison*, 4 B. & A. 590.

(*i*) *Warne v. Varley*, 6 T. R. 443.

(*k*) *Supra*, 800. Therefore commissioners of bankrupts are not liable in trespass for committing a bankrupt for not answering satisfactorily. *Doswell v. Impey*, 1 B. & C. 163; see *Müller v. Jean*, 2 Bl. Rep. 1141.

(*l*) *Holroyd v. Breare*, 2 B. & A. 473.

(*m*) See *Griffin v. Parsons*, Selw. 21. [See 1 Mod. 3.]

(*n*) Bro. Tres. pl. 40; Lib. Ass. Ann. 22. f. 99. pl. 60.

PART
IV.Trespass to the
person.

ing him, will not constitute an arrest or imprisonment (*o*). Where upon a magistrate's warrant being shown to the plaintiff, the latter voluntarily and without compulsion attended the constable, who had the warrant, to the magistrate; it was held, that there was no sufficient imprisonment to support an action (*p*). Yet it seems that in ordinary practice words are sufficient to constitute an imprisonment; if they impose a restraint upon the person, and the plaintiff is accordingly restrained; for he is not obliged to incur the risk of personal violence and insult by resisting until actual violence be used (*q*).

- * 1450 * It frequently happens that false imprisonment includes a battery (*r*); but it is obvious that the latter is not necessarily included in the former (*s*).

It has been seen that a conviction of the defendant upon an indictment for an assault and battery is not evidence in a civil action (*t*), but that a confession by pleading guilty is evidence of the fact (*u*).

The mere admission by one of several defendants in trespass will not be evidence against the rest to prove them co-trespassers; but if several be proved to be co-trespassers by competent evidence, the declaration of one as to the motives and circumstances of the trespass will be evidence against all who are proved to have combined together for the common object (*x*).

Damages.

3. As the jury in an action of trespass are not restrained in their assessment of damages to the amount of the mere pecuniary loss sustained by the plaintiff,

(*o*) Dalt. c. 170.

(*p*) *Arrowsmith v. Le Mesurier*, 2 N. R. 211.

(*q*) I have known more than one instance in which words alone have been held to be sufficient. In one case, where a constable required the plaintiff to go along with him before a magistrate, information having been given to the constable by the defendant that the plaintiff had committed a felony, and the plaintiff accordingly accompanied the constable, Bayley, J. held, (after the above cases had been cited), that there was a sufficient imprisonment to sustain the action.

(*r*) B. N. P. 22; *Oxley v. Flower and another*, Selw. 37. n.

(*s*) *Emmett v. Lyne*, 1 N. R. 255.

(*t*) *Supra*. Pt. II. sec. LXXI. LXXII. On the same principle, the conviction of the defendant before a magistrate of an assault upon the information of the plaintiff, is not evidence. *Smith v. Rummens*, 1 Camp. 9.

(*u*) Pt. II. p. 218.

(*x*) Per Ld. Ellenborough, 11 East, 584. But *semble*, this must be limited to such declarations as are made in furtherance of the common object. *supra*, 403.

but may award damages in respect of the malicious conduct of the defendant, and the degree of insult with which the trespass has been attended (y), the plaintiff is at liberty to give in evidence the circumstances * which accompany and give a character to the trespass (z) (1).

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IV.

Damages,
aggravation.
* 1451

If the defendant, whilst he is an actual trespasser in the plaintiff's house, or on his land, commit any other trespass to the person of the plaintiff, or to the persons of his wife, children, or servants, then, although distinct and substantive actions of trespass might have been maintained in respect of such trespasses, or actions on the case might have been supported, for the consequential damage in respect of the loss of service, or expenses of cure, &c. yet such acts of trespass and their consequences may be alleged and proved in aggravation of the damages. Thus, in an action for breaking and entering the plaintiff's house, the debauching of his daughter and servant, and the consequential damage to the plaintiff, may be laid and proved in aggravation (a) (2). Where, however, the trespass to

(y) 2 M. & S. 77; *Merest v. Harvey*, 5 Taunt. 442; 1 Marsh. 139; *Sears v. Lyons*, 2 Starkie's C. 318. [See *Tilden v. Metcalf*, 2 Day, 259. *Churchill v. Watson*, 5 Day, 140. *Woert v. Jenkins*, 14 Johns. 352. *Tillotson v. Cheetham*, 3 Johns. 64. *Pritchard v. Pappillon*, 3 Harg. State Trials, 1071.]

(z) See the observations of Le Blanc, J. 2 M. & S. 77. In an action for breaking and entering the plaintiff's close, and searching for game therein, the plaintiff was permitted to prove that the defendant being a member of parliament and a magistrate, had, on being warned off the plaintiff's land, used very intemperate language, and threatened to commit the plaintiff. The Jury gave 500*l.* damages, and the Court of C. B. refused to grant a new trial. 5 Taunt. 442.

(a) [*Ream v. Rank*, 3 Serg. & Rawle, 215.] *Bennett v. Alcott*, 2 T. R. 166. The practice was formerly to the contrary; and it

(1) [In trespass *quare clausum*, &c. the plaintiff may give evidence of consequential damages sustained by him in his crop, by reason of the defendant's driving away his negroes. *Johnson v. Courts*, 3 Har & M'Hen. 510. In an action for breaking and entering the plaintiff's dwelling-house, evidence may be given of keeping the plaintiff out, because that is a consequence of the wrongful entry. *Sampson v. Coy*, 15 Mass. Rep. 493. In an action for assault and battery, the plaintiff may give evidence of obviously probable effects of the battery, though not laid in the declaration. *Avery v. Ray & al.*, 1 Mass. Rep. 12. See *Rising v. Granger*, cited *infra*, 1454, note (1).]

(2) [In trespass for breaking and entering the plaintiff's house, with intent to ravish his wife, the defendant cannot give evidence that the plaintiff's wife was, at the time of the trespass, of lewd and abandoned character. *Davenport v. Russell*, 5 Day, 145.]

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IV.

Aggravation.

* 1452

the house or land is the gist of the action, and consequential damage is laid merely in aggravation, if the principal trespass can be justified, it is an *answer to the whole action, and the plaintiff cannot recover in respect of matter laid merely in aggravation; although if alleged alone it would have afforded a substantive ground of action. Thus, if the defendant can justify the entering into the house under a license, it will be an answer to the counts alleging a breaking and entering; although a debauching of the servant and daughter and loss of service, be laid in aggravation (b).

The rule seems however to be confined to such injuries as amount to trespasses, for the obvious reason, that to permit a substantive injury requiring a different form of action, to be alleged by way of aggravation, would be in effect to confound the forms of action, which ought, on principles of policy and convenience, to be kept separate. Still it seems that the defendant's intention, and his conduct and expressions, whilst he was in the act of committing the injury, are always evidence to show his malice, and the degree of insult offered to the plaintiff; although where they afford a distinct ground of action to be brought in a different form, the jury are not to award damages in respect of that distinct injury or its consequences, but only in respect of the principal trespass. Thus, in the case of *Bracegirdle v. Orford* (c), the declaration was for breaking and entering the plaintiff's house, and without any probable cause, and under a false and unfounded charge and assertion that the plaintiff had stolen property in her house, searching and ransacking the same, by means whereof the plaintiff was interrupted * in the quiet enjoyment of her house, and her character injured. The learned judge who

* 1453

was held, that a substantive and distinct act of trespass, which might be made the subject of a distinct action, as in the case of an assault on the daughter and servant of the plaintiff, *per quod servitium amisit* could not be laid in aggravation. See the observations of Buller, J.; B. N. P. 89.; *Newman v. Smith*, Holt, 699; 2 Salk. 642; *Stippora v. Basset*, 1 Sid. 225. There seems to be no reason why the whole transaction being continued and connected together should not be stated in the same action and in the same count.

(b) *Bennett v. Alcott*, 2 T. R. 166. So in trespass for breaking and entering the plaintiff's house, and expelling him therefrom, the expulsion is mere aggravation, and a justification of the breaking and entering covers the whole. *Taylor v. Cole*, 3 T. R. 292. *Secus*, where a distinct trespass to the person or goods is alleged. See *Phillips v. Hougate*, 5 B. & A. 220. [*Sampson v. Coy*, 15 Mass. Rep. 493.]

(c) 2 M. & S. 77.

tried the cause, informed the Jury that if there was a charge of having stolen goods in the house, the damages ought not to be merely nominal. After a verdict for the plaintiff, damages 50*l.*, it was afterwards objected, in arrest of judgment, and on a motion for a new trial, that the declaration was bad, and the direction of the judge wrong; but Lord Ellenborough said, "as to the exception taken to the declaration, the trespass is the substantive allegation, and the rest is laid as a matter of aggravation only. On the other point it does not appear that the learned judge told the Jury they might go beyond the damages for the trespass, and consider the rest as a subject of substantive damage, or in any other wise than as connected with the trespass; and that is the constant course of considering it. In actions for false imprisonment, the Jury look to all the circumstances attending the imprisonment, and not merely to the time for which the party was imprisoned, and give damages accordingly. So here the breaking and entering the plaintiff's house for the purpose of searching it, and under the false charge, constitutes the trespass; and the false charge was not left as a distinct substantive ground of damage."

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IV.

Aggravation.

But the plaintiff cannot recover in respect of any injury for which an action lies by another, or by himself and another jointly.

In an action of trespass for an assault on the wife or servant of the plaintiff, *per quod consortium amisit*, or *servitium amisit*, the Jury cannot take into consideration the injury suffered by the wife or servant, in respect of which a distinct action lies (*d*).

* So if the action be brought by the husband and wife *1454 for a trespass to the latter, no evidence is admissible of any consequential damage to the husband alone (*e*).

The plaintiff cannot give evidence of any matters in aggravation not stated on the record, (although they would not have supported any substantive action) which do not naturally and even necessarily result from the injury alleged on the record. Thus, if the declaration merely allege a false imprisonment, he cannot give evidence in aggrava-

(*d*) *Edmondson v. Machell*, 2 T. R. 4. In an action for assaulting and beating the plaintiff's niece, *per quod servitium amisit*, it seems that the Jury cannot take into consideration the injury sustained by the niece herself, who has been deflowered. *Ibid.* [See *Yelv.* 90, note (1).]

(*e*) *Supra*, 686.

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IV.

Aggravation.

Alia enormia.

Quare clau-
sum fregit.

* 1455

Notice.

tion that he was stinted in his food (*f*), or that he caught an infectious disorder (*g*) (*l*).

Proof of special damage from the loss of lodgers is not maintainable, unless the loss, and the names of the lodgers, be specified in the declaration (*h*).

It seems to have been held formerly that matters might be given in evidence under the *alia enormia*, which could not with decency be stated on the record (*i*); and therefore that the plaintiff in an action of trespass for breaking and entering his house, might prove in aggravation, although it was not stated on the record, that whilst there he debauched the plaintiff's daughter (*k*).

Considering, however, that it is the common practice * to allege the debauching of a daughter and servant on the record, in an action of trespass and assault, or in an action on the case, this doctrine, as applied to such a case, savours of an excess of modesty and refinement, and weighs but little against the general principle, which requires that the defendant shall be specially informed by the record of the facts on which the plaintiff relies.

The defendant may be found guilty of any part of the trespass alleged. If the declaration be for cutting and taking away trees, he may be found guilty of the taking, although the cutting be not proved (*l*).

4. It is frequently requisite, with a view to costs, to prove that the trespass was wilful and malicious under the statute (*m*). The usual evidence for this purpose consists in proof that the trespass was committed after notice. It has been held, that where the trespass has been committed after proof of notice, the Judge is bound to certify (*n*); but in a later instance this was held to be discretionary (*o*).

(*f*) *Lowden v. Goodrick*, Peake's C. 46.

(*g*) *Pettit v. Addington*, Ibid. 62.

(*h*) *Westwood v. Cowne*, 1 Starkie's C. 172. See 1 Vin. Ab. 469. *Hartley v. Herring*, 8 T. R. 130. *Fenn v. Dixie*, 1 Roll. Ab. 58; B. N. P. 7; 2 Will. Saund. 411, n. (4). See *vide supra*, 871, 2, 3.

(*i*) See *Lowden v. Goodrick*, Peake's C. 46; 6 Mod. 127.

(*k*) Gilb. L. E. 240, 2d edit.; 6 Mod. 127; Mr. Peake's observations, Peake's L. E. 323, 5th edit.; [505, Norris's edit.] 2 Sid. 225; 1 Keb. 787; Cro. Jac. 538.

(*l*) B. N. P. 94.

(*m*) 8 & 9 Will. III. c. 11, s. 4.

(*n*) *Reynold v. Edwards*, 6 T. R. 11.

(*o*) *Good v. Watkins*, 3 East, 495.

(1) [In *Rising v. Granger*, 1 Mass. Rep. 47, it was held that the plaintiff could not, in an action for false imprisonment, prove special damages, unless they were laid in the declaration.]

So, with a view to costs, it may be necessary to prove that the defendant is an inferior tradesman, apprentice, or other dissolute person, within the stat. 4 & 5 W. & M. c. 23, s. 10 (*p*).

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In actions against magistrates, constables, and other peace-officers, it has been seen that notice of action, and a demand of a copy of the warrant, is frequently necessary (*q*); and proof of notice of action is sometimes * necessary in other cases, under the provisions of particular statutes.

Notice of
action.

* 1456

Where an act provides that no action shall be maintained without notice to the defendant or defendants of such intended action, a separate notice to each defendant, not mentioning the names of the other defendants, is sufficient in a joint action against all (*r*).

5. The defendant may give in evidence under the general issue any matter which contradicts the plaintiff's evidence, or shows that the act complained of is not in its own nature a trespass at common law (*s*). Thus he may prove that the *locus in quo* was his own freehold, or that of another by whose authority he entered (*t*); or that he has any other title or right to the possession (*u*); or that he is tenant in common with the plaintiff (*x*); or that he entered by command of another who is tenant in common with the plaintiff (*y*); for a man cannot, in point of law, be a trespasser in merely exercising a right which the law gives him (*z*);

Defence.
General issue.

(*p*) It has been held that a clothier keeping an alehouse, and not qualified, is within the statute. Barnes. 125. Vide *supra*, 631, 2.

(*q*) *Supra*, 792.

(*r*) *Agar v. Morgan*, 2 Price, 126.

(*s*) Per Buller, J. Dougl. 610. *Le Caux v. Eden*, Dougl. 594.

(*t*) *Dodd v. Kyffin*, 7 T. R. 354. *Derisley v. Neville*, 1 Leon. 301. *Argent v. Durrant*, 8 T. R. 403. *Garr v. Fletcher*, 2 Starkie's C. 71; Gilb. Ev. 258; Bro. Gen. Issue, pl. 82. *Chambers v. Donaldson*, 11 East, 72. In *Philpot v. Holmes* (Peake's C. 67), it is said that the defendant cannot under the general issue prove title in another, and an entry by his command. But see the above cases.

(*u*) As that the interest of the plaintiff, who held under the defendant, had expired at the time of the alleged trespass. *Argent v. Durrant*, 8 T. R. 403.

(*x*) Gilb. Ev. 204.

(*y*) Gilb. Ev. 204. *Rosse's case*, 3 Leon. 83.

(*z*) See Gilb. Ev. 221. It is true, that by making a forcible entry upon a party in actual possession, the party entitled to the possession may be criminally responsible for his breach of the peace. See the statute, 8 H. VI. c. 9, s. 6. But in an action for a forcible entry he would, it seems, be entitled to a verdict, on proof of his title to the possession, just as in a common action of trespass. The effect of

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IV.

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* or, where the action is brought for cutting down trees, that he was lessee for years of the lands on which the trees grew (*a*), for he has a special property in them for repairs and shade; or that the trees were sold to the defendant by the tenant in tail in possession (*b*).

So he may show that the goods were sold to him under an execution upon a judgment obtained by him against the plaintiff; but in such case he should be prepared to prove the judgment as well as the writ (*c*); or that the plaintiff had parted with the possession, and was not entitled to it at the time of the trespass (*d*); or that the property has been devested by forfeiture (*e*).

* 1458 In the case of an assault, the intention of the defendant is material, and he may go into evidence to * prove *quo animo* the act was done, in order to show that there was no assault (*f*).

the Statutes of Forcible Entry in relation to civil actions seems to be confined to the giving treble damages where a forcible entry is alleged and proved, instead of the single damages recoverable in a criminal action. If a tenant after notice to quit continue in possession, the landlord may enter without ejectment; if he use illegal force an indictment lies. *Turner v. Meymott*, 1 Bing. 158. *Taunton v. Costar*, 7 T. R. 431.

(*a*) B. N. P. 84. Aleyn, 82. *Secus*, where trees are excepted in the lease, or are taken away after severance (*Herlakenden's case*, 4 Co. 62. Moore, 248), or where the party is mere tenant at will, for the tortious act determines the will (*Ibid.* and Co. Litt. 57). If *A.* plant a tree at the extreme limit of his own land, and the tree growing, extends its roots into the land of *B.*, *A.* and *B.* are tenants in common of the tree; but if all the roots grow in *A.*'s land, though the boughs shadow the land of *B.*, the property is in *A.* B. N. P. 85; 1 Ld. Ray. 737.

(*b*) Sir R. H., under whom the plaintiff claimed as heir in tail, being tenant in tail, sold to the defendant 300 of the best trees in such a wood, to be taken within a limited time, for a valuable consideration; Sir R. died, and the defendant within the time took the trees. Upon not guilty pleaded, Jones, C. J. held that the sale was within the stat. 27 Eliz. c. 4, and bound the heir in tail, and the plaintiff was nonsuited. *Hatton v. Neal*, B. N. P. 90. Note, that the settlement was with a power of revocation.

(*c*) See *Doe v. Smith*, 2 Starkie's C. 199.

(*d*) *Ward v. Macauley*, 4 T. R. 489.

(*e*) *Wilkins v. Despard*, 5 T. R. 112.

(*f*) See *Griffin v. Parsons*, Gloucester Lent Assizes, 1754, Selw. N. P. 27. Trespass for an assault, plea *son assault demesne*, replication *de injuria*, the defendant and another were fighting, and the plaintiff came up and took hold of the defendant by the collar, in order to separate the combatants, whereupon the defendant beat the plaintiff. It was objected, that to warrant this evidence, the matter ought to have been replied specially; but Legge, B. overruled the objection, observing that the evidence was not offered by way

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IV.Defence.
General issue.

In the case of a battery, an actual intention to injure is not essential to the action, and a defendant is responsible in damages for any immediate injury to the person of another, although the injury was not wilful (g). Yet it seems that some degree of negligence or inattention is even in this case essential, and that it is a good defence to show that the accident was inevitable. Thus, if *A.* beat the horse of *B.*, which runs against *C.*, or if *A.* take the hand of *B.* and with it beat *C.*, *A.* and not *B.* is the trespasser; and this would be a good defence for *B.* under the general issue (h).

So if the injury was accidental on the part of the defendant, and might have been avoided by the plaintiff; as where the defendant's horse runs away with him, and the plaintiff refuses to go out of the way, and is hurt (i).

* It is no defence that the plaintiff was arrested under a * 1459 mistake: as if *A.* be by mistake apprehended under a Judge's warrant directed against *B.* (k); or that the defendant, supposing the plaintiff to be liable to be impressed, caused him to be impressed, when in fact he was not liable (l).

Where a ship was taken as a prize, but afterwards acquitted, it was held that trespass for false imprisonment would not lie at common law (m) (1).

So it has been held, that under this issue the defendant might show that the plaintiff's horses, which had been seiz-

of justification, but for the purpose of showing that there was no assault, for it was the *quo animo* which constituted the assault, which was left to the Jury. See also Gilb. L. Ev. 256, 2d edit.; *infra*, 1470.

(g) *Weaver v. Ward*, Hob. 134. *Underwood v. Hewson*, 1 Str. 596; 2 Salk. 637; 1 Ld. Raym. 38; 4 Mod. 405. [*Taylor v. Rainbow*, 2 Hen. & Mun. 423.]

(h) See the cases cited in the last note; and also *Scott v. Shepherd*, 3 Wils. 403.

(i) *Gibbons v. Pepper*, 2 Salk. 637; 1 Ld. Raym. 38; 4 Mod. 405. Note, the defendant pleaded a special justification, which was held to be bad for not confessing the trespass; but the Court held that the defence would have been available under the general issue.

(k) *Aaron v. Alexander & others*, 3 Camp. 35.

(l) *Flewster v. Royle*, 1 Camp. 187.

(m) *Le Caux v. Eden*, Doug. 594.

(1) [See *Faith & al. v. Pearson*, 6 Taunt. 439, and note to the American edition—S. C. 4 Camp. 357, and Mr. Howe's note. *Novion v. Hallet*, 16 Johns. 337. *Simpson v. Nadeau*, Cam. & Nor. 115. *Percival v. Hickey*, 18 Johns. 257. *Maisonnaire & al. v. Keating*, 2 Gallison, 342.]

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ed under pretence of their being estrays, were delivered to him as pound-keeper; for he was not a trespasser in receiving and detaining them (n).

Defence.
General issue.

It is a good defence to show that the injury arose from the negligence of the defendant's agent in the management of his vessel, for there the proper remedy is by an action on the case (o).

Merger.

No action will lie if it appear that the civil action has merged in a felony (2); but after an acquittal for the * 1460 * felony, an action is maintainable (p), provided there be no collusion (q). The acquittal must be proved by the production of the record, or an examined copy of it; and the defendant may give evidence to show that it was collusive.

Mitigation.

The defendant cannot give in evidence under the general issue matters which might have been pleaded in bar (r). In an action for a battery, the defendant cannot, under this issue, prove that the beating in question was inflicted by way of punishment for misbehaviour (s); yet he may give any circumstances in evidence in mitigation, which tend to reduce the quantum of damage sustained by the plaintiff, and which could not have been pleaded. Thus, in trespass for cutting trees, the defendant was per-

(n) *Badkin v. Powell*, Cowp. 476. [Yelv. 42, a. note (1).] Yet the same may be said in the case of a gaoler, who is nevertheless bound to justify specially in an action for false imprisonment. Aston, J. in the above case, distinguished it from the case of a gaoler; the latter always acting under a warrant. But this is to make the necessity of a special plea to depend, not upon the nature of the justification, but upon the nature of the proof by which it is to be supported. It is, indeed, a general principle, that if an officer do only that which belongs to his office, he shall not be liable to any precedent tortious acts of which he could know nothing (T. Jones, 214, cited by Aston, J. in the foregoing case). But if this doctrine bears upon the question of pleading, it is also applicable to the case of a gaoler, and was equally applicable to the cases of constables and other peace-officers previous to the stat. 24 Geo. II. c. 44.

(o) *Huggell v. Montgomery*, 2 N. R. 446, [and Mr. Day's note.]

(p) *Crosby v. Leng*, 12 East, 409.

(q) *Ibid.*

(r) *Watson v. Christie*, 2 B. & P. 224.

(s) *Ibid.* For where the trespass has been established which is not justified, the only remaining question is as to the extent of the damage.

(2) [See Yelv. 90, a. note (2), and cases there collected. Observations of Lord Ellenborough, in *Beckwith v. Wood & al.* 2 Starkie's C.—1 B. & A. 490. *Cushing v. Gore & al.* 15 Mass. Rep. 69. *Boardman v. Gore & al.* *ibid.* 331. *Smith v. Weaver*, 2 Hayw. 106.]

mitted to show that the trees had been applied to purposes for which the plaintiff had covenanted to furnish timber by assignment of his bailiff (t). So matter of provocation which could not have been pleaded in bar may, it seems, be given in evidence (u) (1). And *although the matter might have been pleaded in bar, yet if it tend to reduce the value of the chattel injured, it is proveable under this issue.

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Mitigation.
* 1461

Thus, although the defendant cannot under this plea prove, in bar of an action for destroying a picture, that it was a gross caricature (x), yet he may prove the fact in mitigation of damages, and the plaintiff can recover no more than the value of the canvass (y).

Some of the statutes which enable a defendant to give

(t) *Rennell & others v. Wither*, Cor. Abbott, J. Winch. Spring Ass. 1813, Manning's Ind. *Trespass*, 36.

(u) In *Dennis v. Pauling* (Vin. Ab. tit. *Evidence*, I. b. pl. 16), Price, B. refused to admit any thing in evidence which tended to justify the words, although offered in mitigation only; saying, that any thing which tended to show a provocation, or any transaction between the parties giving occasion for speaking the words, was proper in the defendant to make out, because these matters cannot be pleaded.

So in *Coot v. Bertie* (12 Mod. 232), it was said that license by the husband, or the lewd character of the wife, could not be pleaded in bar of trespass by the husband; yet that those matters were evidence in mitigation of damages.

If trespass be brought by an executor against an executor *de son tort*, he may give in evidence payment of debts to value in mitigation of damages; but he is still a trespasser, and there must be a verdict against him. B. N. P. 91; 12 Mod. 441.

(x) *Du Bost v. Beresford*, 2 Camp. 511. And where such a caricature is openly exhibited, it seems that the defendant might justify the destruction as abating a public nuisance. *Ibid*.

(y) *Ibid*.

(1) [In an action for assault and battery, immediate provocations are admissible in evidence to mitigate damages: *Aliter*, "where the blood had time to cool" before the battery was inflicted. *Avery v. Ray & al.* 1 Mass. Rep. 12. S. P. *Barry v. Inglis*, 1 Taylor, 121. 2 Hayw. 102. *Lee v. Woolsey*, 19 Johns. 319. In *Waters v. Brown*, 3 Marsh. 559, it was held, that though former threats or insults will not palliate a later assault and battery, yet if the injury is inflicted in the attempt to prevent the execution of those threats, the defendant may give those threats in evidence in mitigation of damages.

Evidence of previous threats made by the defendant in the plaintiff's presence, have been held admissible to enhance damages, in an action for assault, &c. *Sledge v. Pope*, 2 Hayw. 402.]

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Quam clau-
sum fregit.

special matter of justification in evidence under the general issue have already been adverted to (z).

By the stat. 11 Geo. II. c. 19, s. 21, it is enacted, that in actions of trespass, or on the case, brought against any person entitled to rents or services of any kind, or against their bailiff or receiver, or other person, relating to any entry by virtue of this act, or otherwise, *upon the premises* (a) chargeable with such rents or services, or relating to any distress or seizure, sale or disposal * of any goods or chattels thereupon, the defendant may plead the general issue, and give the special matter in evidence (b).

But the defendant cannot under the general issue, except by virtue of the positive enactment of a statute, give in evidence any matter in excuse, justification, or satisfaction of the alleged trespass (1); such as a release (c), or accord and satisfaction (d), or recovery against another party, and payment by him (e), or that goods

(z) The stat. 21 Jac. I. c. 12, s. 5, relating to justices, mayors, bailiffs, headboroughs, portreeves, constables, tithing-men, churchwardens, overseers, and their deputies, &c. *supra*, 800. See the stat. 43 Eliz. c. 3, s. 19, as to taking distresses, making sales, and other acts done by the authority of that statute. A churchwarden cannot justify the cutting and breaking to pieces a pew, although wrongfully erected. *Noy*, 108; *Burn's Ecc. L.* 365, 7th edit.

(a) If the defendant justify the seizing of goods (under the first sect.) which have been fraudulently removed to avoid a distress, he must still plead the defence specially. *Vaughan v. Davis*, 1 Esp. C. 257; *Furneaux v. Fotherby*, 4 Camp. 136.

(b) Trespass lies where the landlord, after making distress, turns the family out, and keeps possession (*Etherton v. Popplewell*, 1 East, 139). So, if entering with a warrant of distress, the party remains on the premises beyond the time allowed by law. *Winterbourne v. Morgan*, 11 East, 395. The landlord may remain a reasonable time beyond the five days, and what is a reasonable time the Jury are to decide. *Pitt v. Shew*, 4 B. & A. 208.

(c) 3 Burr. 1353.

(d) *Ibid.*

(e) *Ibid.*

(1) [In Vermont, in an action of trespass against a town or parish collector, the defendant may, under the general issue, give in evidence his authority to take the property in question, in justification. *Wilcox v. Sherwin*, 1 Chip. Rep. 72. This practice is there confined to matters existing at the time of the trespass charged, and which, if established, will prove that the defendant has done no wrong, but acted legally and right by virtue of good authority—and is not extended to subsequent matter (as a release, &c.) by which the defendant may avoid the consequences of the trespass charged by the plaintiff. Per Chipman, C. J. *Ibid.* p. 77.]

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were seized as a deadand (*f*), or heriot, or for a distress damage-feasant (*g*), or leave and license (*h*) (2); or any interest short of property and right of possession; such as a right of common (*i*), or a public or private right of way (*k*), or a right to an easement (*l*), or defect in the plaintiff's fences (*m*), or that the supposed trespass arose from necessity (*n*), or accident, or from the negligence of the plaintiff (*o*), or that the defendant entered * to take his emblements or cattle (*p*), or to remove * 1463 a nuisance (*q*), or to execute process (*r*), or in fresh pursuit of a felon (*s*), or that a stranger is tenant in common with the plaintiff (*t*). For these are matters which do not directly contradict that which the plaintiff would be bound to prove under the general issue, but which show collaterally that the action is not maintainable (1).

(*f*) *Dryer v. Mills*, 1 Str. 61.

(*g*) B. N. P. 90; Co. Litt. 233.

(*h*) Plowd. 14; Gilb. C. P. 63. [*Gambling v. Prince*, 2 Nott & M'Cord, 138.] In an action of trespass *quare clausum fregit*, and debauching the plaintiff's daughter, the defendant cannot under the general issue give evidence of a license from the wife. *Bennett v. Alcott*, 2 T. R. 166; Gilb. Ev. 216.

(*i*) 1 Inst. 282, 3.

(*k*) *Selman v. Courtney*, Vin. Ab. Evidence, Z. pl. 91; 1 Burr. 145. 175; 1 Salk. 287. [*Babcock v. Lamb*, 1 Cowen, 238.]

(*l*) *Hawkins v. Wallis*, 2 Wils. 173. Although it has been exercised for thirty years. *Ibid.* Gilb. Ev. 217, 220.

(*m*) Co. Litt. 183, a. Gilb. Ev. 216; B. N. P. 90.

(*n*) Com. Dig. Pleader, 3 M. 20. 30.

(*o*) *Knapp v. Salisbury*, 2 Camp. 500. It is otherwise, it seems, where the defendant is a mere passive instrument by means of which the injury is occasioned; as if *A.* seize the hand of *B.*, and beat *C.* with it; *vide supra*, 1458. So it seems, that if *B.* were against his will seized by force, and thrown on the land of *C.* and again removed without his consent. [See *Smith v. Stone*, Style, 65].

(*p*) B. N. P. 90. 54. 85.

(*q*) *Ibid.*

(*r*) Bro. Gen. Issue, 81; B. N. P. 90.

(*s*) *Ibid.*

(*t*) B. N. P. 91.

(2) [A letter of license from the plaintiff was allowed to be given in evidence under the general issue, in trespass *quare clausum, &c.* by the court of North Carolina. *Cox v. Dove*, Martin's Rep. 43. A person who enters under a void license is a trespasser. *Chandler v. Edson*, 9 Johns. 362.]

(1) [In trespass *quare clausum fregit*, an entry or location of land may be given in evidence under the general issue, in Tennessee. *Duncan v. Blair*, 2 Overton's Rep. 213.]

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General issue.

And facts which might have been pleaded cannot be given in evidence under the general issue (u). Neither can the defendant prove in bar that the plaintiff has no property in the lands or goods where he proves possession, for that is sufficient to support the action (x). So he cannot under this issue justify the cutting down posts of the plaintiff, although they were fixed in the defendant's own soil (y).

* 1464

Justification in
general.

In an action of trespass for breaking and entering the plaintiff's close, and pulling down certain buildings there, the defendant, as to the breaking and entering, let judgment go by default, and pleaded the general issue as to the residue; and it was held that his plea was supported by evidence that the building, which was of wood, had been erected by him, being tenant of the premises, on a foundation of brick, for the purposes * of trade, and that he still remained in possession at the time of the removal, although his term had expired (z).

It is a general rule, that if the defendant show any thing which excuses the trespass, it is sufficient, although the proof be not commensurate with the extent, quantity, or number alleged and proved (a).

If in trespass for taking cattle, the defendant justify, as lord of the manor, the taking, as a distress damage-feasant, and the plaintiff reply a right of common for commonable cattle, levant and couchant, &c. and the defendant traverse the levancy and couchancy of the cattle distrained, and it appear in evidence that some were levant and couchant, and others not, the defendant will be entitled to the verdict (b). But if the lord were in such case to bring trespass *quare clausum fregit*, and the defendant to plead the right of common, and that the cattle were levant and couchant, and issue were to be joined on the levancy and couchancy, on proof that some were levant and couchant, the defendant would succeed (c).

Liberum tenementum.

6. As the object of the plea of *liberum tenementum* usually is to compel the plaintiff to assign the place in which he

(u) *Christie v. Watson*, 2 B. & P. 244.

(x) B. N. P. 91; 1 Salk. 4.

(y) *Welch v. Nash*, 8 East, 394.

(z) *Penton v. Robart*, 2 East, 88. [See *Wells & al. v. Bannister & al. & trustee*, 4 Mass. Rep. 514. *Taylor v. Townsend*, 8 ib. 411. *Washburn & al. v. Sproat*, 16 ib. 449.]

(a) See 1 Will. Saund. 346, d.

(b) *Supra*, 390.

(c) *Ibid*.

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mentum.

alleges the trespass to have been committed with greater precision (*d*), and as upon this plea being pleaded the plaintiff usually amends, or new assigns the *locus in quo*, it seldom happens that the plaintiff's title to damages rests upon this plea, especially as the defendant may give the matter in evidence under the general issue (*e*).

If issue be joined on the plea of *liberum tenementum*, the defendant may elect to what parcel he will apply *his * 1465 plea, and the plaintiff cannot insist on a trespass in any other parcels without a new assignment (*o*). And therefore if the plaintiff allege a trespass in his close, situate in the parish of *A*. generally, and issue be joined on this plea, the defendant would be entitled to a verdict on proving that he had any quantity of land, however small, within the parish (*f*). So, if the defendant plead that the *locus in quo* had been immemorially parcel of land on which the defendant is entitled to a right of common, &c. and the plaintiff reply that the *locus in quo* has been inclosed for twenty years, on issue joined on this replication the plaintiff would fail, if it appeared that any part of the common had been inclosed within the twenty years (*g*).

If the defendant justify under an alleged grant of a close, and it appear in evidence that he has a partial interest only in the land, such as the first crop, the variance will be fatal; for a grant of the close imports a grant of the soil (*h*).

(*d*) See *Stevens v. Whistler*, 11 East, 51. Where the plaintiff in his declaration names the close, he is not bound, on *liberum tenementum* pleaded, to new assign, although it appears that the defendant has a close of the same name within the parish. *Cocker v. Crompton*, 1 B. & C. 489.

Trespass by the proprietors of a canal; evidence of acts of ownership by the proprietors on other parts of the banks are not admissible to prove property, without showing them to be part of one entire district. *Hollis v. Goldfinch*, 1 B. & C. 105. See *Buckeridge v. Ingram*, 2 Ves. jun. 652; *Stanley v. White*, 14 East, 332; *Tyrwhitt v. Wynne*, 2 B. & A. 554; *supra*, 421.

(*e*) *Supra*, 1456.

(*o*) *Hawke v. Bacon*, 2 Taunt. 156. See the rules of the K. B. and C. B. of Mich. 1654, as to new assignments.

(*f*) *Elvis v. Lombe*, 6 Mod. 117. Per Willes, C. J. in *Lambert v. Strother*, Willes, 223. Per Lawrence, J. in *Goodright v. Rich*, 7 T. R. 335; B. N. P. 90; 6 Mod. 117; 1 Litt. 148, sec. 84. 23. c. 147.

(*g*) 2 Taunt. 156.

(*h*) *Stammers v. Dixon*, 7 East, 207. One may hold the *prima iusura* of land as copyhold, and another may have the soil and every other beneficial enjoyment of it as freehold. And ancient admissions of the copyholder, and those under whom he claims the

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Liberum tenementum.

Some observations have already been made with * respect to presumptive evidence of title to land (i). Where a strip of waste land lies between a highway and an adjoining freehold, the *prima facie* presumption is, that both the strip of land and the soil of the highway *ad medium filum viæ*, are the property of the owner of the inclosure (k) — a presumption capable of being rebutted by proof of acts of dominion exercised upon such wastes by the lord of the manor or others (l). Where strips of land so situated are connected with open commons, the presumption is liable to be much weakened by evidence of ownership applicable to such commons (m).

The cutting down of trees by the side of a highway, and the cleaning and repairing of the way, are evidence of ownership of the soil (n).

Right of way, easement, &c.

7. If the defendant justify under a claim of a right of way, or other easement in the lands of the plaintiff, the latter cannot dispute the right upon issue taken on the general replication *de injuria sua propria*, &c. but must specifically traverse the right as claimed, whether by prescription or grant (o). And the same rule holds where the defendant justifies under the command of another who claims a right (p).

It has already been seen that long-continued usage and enjoyment afford evidence of a title by prescription or grant, and in what manner such evidence may be answered (q).

* 1467

Quare clausum fregit.
Presumption.

* Where it was pleaded that an ancient messuage and twelve acres of land were immemorially parcel, and a customary tenement, of the manor of A., and that there was an immemorial custom within the manor for the customary

land by the description of *tres acras prati*, may be construed only to enjoy the *prima tonsura*, if in fact they have enjoyed no more under such admissions, while another has had the after-crop, and has cut tares and furze, and scoured the ditches, repaired the fencing, and kept the drains, though the copyholder, (in his own wrong) may have paid the rates and taxes. *Ib.*

(i) *Supra*, 515. 1227.

(k) *Grose v. West*, 7 Taunt. 39; *Stevens v. Whistler*, 11 East, 51.

(l) *Steel v. Prickett and others*, 2 Starkie's C. 463.

(m) *Grose v. West*, 7 Taunt. 39.

(n) *Vin. Ab. Ev. T. b.* 102; 2 Leon. 148; pl. 182.

(o) *Crogate's case*, 8 Co. 61; *Ruishbrook v. Pusanie*, 4 Leon. 16.

(p) *Cooper v. Monte*, Willes, 54; *Cockerill v. Armstrong*, Willes, 99. 7 Mod. 247. (Leach's edit.) See *Proud v. Hollis*, 1 B. & C. 8. *Infra*, 1679.

(q) *Supra*, 1202. 1227. And see tit. *Highway*.—*Way*.

tenant of the tenement to have a right of common, &c. and the replication traversed the custom, it was held that the replication did not admit the antiquity of the messuage; but that the plaintiff might prove that it was built within twenty years, and not on the site of an ancient house (r).

A traverse of a fact material to the defendant's justification puts the law as well as fact in issue. In trespass for taking hares, where the defendant justified the seizure by command of the lord of the manor, as being found in the possession of an unqualified person, and issue was taken on the command, it was held that proof was necessary of a command, which would legalize the seizure, and that proof of a wrongful command would not maintain the issue (s).

Traverse of
command.

8. Where issue is joined on the general replication *de injuria sua propria absque tali causa*, it is incumbent on the defendant to prove every material allegation in his plea (t). For the cause alleged is the matter of excuse alleged, and all the material allegations constitute but one cause or excuse (u), the proof of which lies on the defendant.

De injuria in
general.

Where, to a declaration for several trespasses the defendant pleads leave and license, and issue is joined * on the replication *de injuria, &c.*, and the defendant proves licenses which cover some but not all the trespasses proved, the plaintiff is entitled to a verdict in respect of those which are not covered (x). For the excuse in this case is that there was a license co-extensive with the trespass complained of.

* 1468

The plaintiff declared in the first count for breaking and entering his house, imprisoning him, and for a battery; 2dly, for an assault and false imprisonment; 3dly, for a common assault. The defendant to the first count pleaded a writ of attachment and sheriff's warrant upon it, by virtue of which he entered the house and arrested the plaintiff, and alleged that because the plaintiff, after he had been taken into custody, behaved himself in a violent

(r) *Dunstan v. Tresider*, 5 T. R. 2.

(s) *Bird v. Dale*, 7 Taunt. 560. [1 Moore, 290. S. C.]

(t) See *Cockerill v. Armstrong*, Willes, 99; 7 Mod. 247, (Leach's edit.); *Crogate's case*, 8 Co. 61; Com. Dig. Pleader, F. 18, &c.; 1 B. & P. 79, 80; Finch's Law, 359. This replication is in general sufficient where the defendant's plea consists merely in matter of excuse, without claiming any title or interest. *Ib.*

(u) *Crogate's case*, 8 Co. 61.

(x) *Barnes v. Hunt*, 11 East, 451.

PART
IV.

De injuria.

and outrageous manner, and could not otherwise be kept in safe custody by the defendant, the defendant was obliged to push and pull about the plaintiff. Replication *de injuria*, &c. (y). Upon the trial, the arrest under the writ and warrant was proved, and the plaintiff also proved a battery after the arrest, and it was held that this rendered it necessary for the defendant under the latter part of his justification to give evidence of some outrageous conduct on the part of the plaintiff when in custody (z), and that a new assignment was unnecessary.

Justification in
general.

* 1469

But it is sufficient to prove so much of the facts alleged as will in point of law amount to a justification, although other facts are alleged which might have been rendered essential to the defendant's justification, by the plaintiff's proof, but which turn out to be immaterial. * Thus, if the plea allege a request to depart previous to a *mollis impositio*, the proof is unnecessary, if the fact of the request be not essential to the justification. The plea of justification alleged that the plaintiff assaulted the defendant whilst he was attending as high sheriff at a county election, and also that he obstructed him in the execution of his duty at that election, wherefore the defendant caused the plaintiff to be committed, &c. the plaintiff having replied *de injuria*, &c. the Jury, by their verdict, negatived the assault, but found that the rest of the justification was proved. And it was held that the proof was sufficient to support the justification; and Mansfield, C. J. said, if a plea of justification to an action of this nature consist of two facts, each of which would, when pleaded alone, amount to a good defence, it will sufficiently support the declaration if one of these facts be found by the Jury (a).

As the general replication *de injuria* is a traverse of the whole plea, the plaintiff is at liberty to go into any evidence which disproves the facts of the plea (b). But he cannot go into any evidence of new matter which shows that the defendant's assertion, though true, does not justify the trespass committed. Thus, in an action of trespass and false imprisonment, where the defendant justifies the

(y) There were similar justifications, except as to the battery to the second and third counts.

(z) *Phillips v. Howgate*, 5 B. & A. 220. Bayley, J. left it to the Jury to say whether the defendant had done more than was necessary for the purpose of keeping the plaintiff safely in custody.

(a) *Spilsbury v. Micklethwaite*, 1 Taunt. 147.

(b) Per De Grey, C. J. in *Sayre v. The Earl of Rochford*, 2 Bl. R. 1169.

commitment as a magistrate for a bailable offence, the plaintiff cannot, under this replication, give in evidence a tender and refusal of bail (c); neither can he, under the same replication to a plea of *son assault demesne*, prove that the defendant, having entered the plaintiff's house, misbehaved * himself there (d). And it seems, that in general, all matters which confess and avoid, such as subsequent misbehaviours with regard to a distress, must be replied specially, to enable the defendant to meet them in evidence.

De injuria,
&c.

* 1470

Upon this replication to the plea of *son assault demesne*, it has been held that the plaintiff cannot insist upon an excess. But yet it may be questioned whether the defendant does not, by his plea, undertake to prove such a cause as is proportioned to and will justify his own act (e) (1).

Where the lord of the manor brought trespass against a commoner for spoiling and destroying his peat, and filling up holes out of which it was dug, and the defendant pleaded a right of common through the waste, and that the plaintiff had dug up peat in some parts of the common and laid it up in other parts, whereby the defendant was hindered from enjoying his right of common in so ample and beneficial a manner as he had used, and had a right to do, the plaintiff replied *de injuria, &c.*, and upon this issue it was held that he was not at liberty to show that there was a sufficiency of common left (f).

A new assignment is not in any case necessary to warrant the admission of evidence to defeat a *special* justification which is not supported by the facts. Thus, if the defendant justify the entering part of a house occupied by the plaintiff, under a writ of *feri* * *facias* against the goods * 1471 of B., whereas in fact no goods of B. were there, this is evidence on a traverse of the justification (g). And a new

(c) Per De Grey, C. J. in *Sayre v. The Earl of Rochford*, 1 Bl. R. 1169.

(d) *King v. Phipard*, Carth. 280.

(e) *Vide supra*, 70. In *Phillips v. Howgate*, 5 B. & A. 220; *supra*, 1468; it was left to the Jury to say whether more had not been done by the defendant than was necessary for keeping the plaintiff safely in custody.

(f) *D'Ayrolles v. Howard*, 3 Burr. 1385; B. N. P. 93. The principle seems to be, that the digging for peat, &c. is to be considered *prima facie* as a prejudice to the right of common, and that the sufficiency of common left is a new fact, and therefore to be pleaded in avoidance.

(g) *Fallon v. Anderson*, Peake's C. 109. If the sheriff enter the

(1) [See *Infra*, 1474, note (1).]

PART
IV.

assignment in such a case would preclude the plaintiff from recovering, for it would admit that an act of entry was justified (*h*).

De injuria,
&c.

Where, however, the plea affords an answer to the gist of the action, and the plaintiff means to rely on matter which makes the defendant a trespasser *ab initio*, or insists that he has been guilty of an excess, he cannot give this in evidence under this general replication, without specially replying such matter of excess (*i*).

* 1472
Excess.

* Where, in trespass for breaking and entering the plaintiff's house, and expelling him from it, the defendant justified the breaking and entering under a writ of *feri facias*, it was held that the justification covered the expulsion also, and that the plaintiff could not rely upon it as an excess which made the defendant a trespasser *ab initio* without replying it (*k*).

house of a stranger to execute a writ, he is justified or not according to the event. *Johnson v. Leigh*, 6 Taunt. 246. [1 Marsh, 565, S. C.] See *Chambers v. Jones*, 11 East, 406.

(*h*) B. N. P. 92. *Oakley v. Davis*, 16 East, 82; *Pratt v. Groome*, 15 East, 235; *Atkinson v. Matteson*, 2 T. R. 176; *supra*, 1440. See *Smith v. Miles*, 1 T. R. 479. If the plaintiff aver a single act of trespass which the defendant justifies, there can be no new assignment. *Taylor v. Smith*, 7 Taunt. 156. If there be two counts, and a justification to each, the plaintiff cannot take issue, and also new assign. *Cheasley v. Barnes*, 10 East, 73. The circumstance that the plaintiff's lands abut on a public highway, affords *prima facie* evidence that the soil is his *ad filum viae*, and therefore the defendant must plead *liberum tenementum*, in order to compel the plaintiff to new assign the trespass in his own exclusive property. *Stevens v. Whistler*, 11 East, 51.

(*i*) *Gates v. Bayley*, 2 Wils. 313; *Moore v. Taylor*, 5 Taunt. 69. As, where the defendant justifies taking goods as a distress, and the plaintiff replies a conversion, it would be premature to state the conversion in the declaration, and the defendant would not be bound to answer it. *Sir Ralph Bury's case*, 1 Vent. 217; *Gargrave v. Smith*, 1 Salk. 221; B. N. P. 81; *supra*, 1445. By the stat. 11 G. II. c. 19, an irregularity in the disposition of a distress for rent will not render the party a trespasser *ab initio*. And see the provisions of the stat. 17 G. II. c. 38, as to a distress made for money justly due for the relief of the poor.*

(*k*) By Buller and Grose, Js. in *Taylor v. Cole*, 3 T. R. 296. This case was relied upon for the defendant in the above-cited case of *Phillips v. Howgate*, but no notice was taken of it by the Court in giving judgment. The principal ground for distinction between the two cases seems to be this, that in *Taylor v. Cole*, the expulsion was a mere aggravated continuance of the trespass which was justified; but in *Phillips v. Howgate*, the imprisonment and battery were distinct trespasses, in addition to the breaking and entering, and that consequently the battery was not covered by a mere justification of the entry and of the arrest.

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So, if the justification be an answer to the breaking and entering, and justify the continuing there for a limited time, the plaintiff cannot, without replying the excess, give it in evidence under the general issue, but ought to reply the excess. Thus, where to an action for breaking, &c. the house, and staying there three weeks, the defendant pleaded not guilty, and a justification as to the breaking and entering, and remaining there for the space of twenty-four hours, *part of the time in the declaration mentioned* under a writ of *feri facias*, and the plaintiff admitting the writ, replied *de injuria sua propria absque residuo causa*, it was held (1) that the plaintiff could not without a new assignment go into evidence of the excess.

On issue taken on a replication *de injuria, &c.* to a plea *son assault*. of *son assault demesne*, which must be pleaded specially (m), the proof is of course upon the defendant, and the plaintiff need not adduce evidence * except for the purpose of encountering the defendant's evidence, and also for the purpose of increasing the damages (n). * 1473

The day stated in the declaration is not material; the defendant may therefore prove an assault by the plaintiff on any other day than that alleged (o). And in such case, if the declaration contain but one count, and there be no new assignment to the plea of *son assault demesne*, the defendant will be entitled to a verdict (p). But if in such case there be several counts, the plaintiff may prove as many assaults as there are counts, and will be entitled to recover in respect of such as are not justified both in allegation and proof (q); or if there be but one count, yet if there be a new assignment, the plaintiff will be entitled to go into evidence of another than that which is justified (r).

But in such case, having by his replication admitted that one assault is justified, he must be prepared to prove two assaults. The defendant admits as many different assaults as he justifies.

In support of this plea, it is essential to prove that the plaintiff committed the first assault on the defendant by some attempt at personal violence, as by laying his hand

(1) *Monprivatt v. Smith*, 2 Camp. 175.

(m) Co. Litt. 282, b. 283.

(n) *Guy v. Kitchenier*, 2 Str. 1271; 1 Wils. 171.

(o) Roll. Ab. tit. *Trial*, (C.) pl. 3.

(p) Roll. Ab. 680; and per Lord Kenyon, in *Walsby v. Dakeley*, Sitt. after Trin. Term, 40 Geo. III. Sel. N. P. 32.

(q) B. N. P. 17. *Smith v. Milles*, 1 T. R. 479.

(r) Roll. Ab. 680.

PART
IV.

Son assault.

* 1474

upon his sword (s), or raising his stick to strike him (t), for these are signs of intended violence; he need not wait until the plaintiff has actually struck him. But this is merely evidence of the intention to use violence, to be considered in conjunction with other circumstances; for if, from the expressions * of the plaintiff at the time, or otherwise, it appear that he did not meditate violence, it is no assault (u).

It has been the practice to preclude the plaintiff from proving under this issue that the violence used by the defendant was excessive, and not at all proportioned to the original assault (x), the excess not having been specially replied.

But it has been doubted by most learned Judges, in former as well as in modern times, whether it be necessary to reply the excess (1). Lord Holt held, that the meaning of the plea was, that he struck in his own defence; and that "if A. strike B., and B. strike again, and they close immediately, and in the scuffle B. maims A., that is *son assault*; but if upon a little blow given by A. to B., B. give him a blow that maims him, that is not *son assault demesne* (y)."

If the defendant prove that the plaintiff committed the first assault, as alleged in the plea, the plaintiff cannot un-

(s) Gilb. Ev. 256, 2d edit.

(t) B. N. P. 18.

(u) Gilb. L. Ev. 256. As if, clenching his fist, he say, that were it not assize-time he would show the defendant more of his mind. (Ibid.) [Supra, Vol. II. 70, note (1).] Also if a man punch another with his elbow in *earnest discourse*, there is no assault; for it is no sign of violence intended, or of any hurt, and therefore doth not call for defence; nor is it necessary that it should be obviated by a resistance. Ibid. and 2 Keb. 545.

(x) Skinn. 387; Willes, 17. See the observations of Holt, C. J. supra, 70, note (g).

(y) Cockcroft v. Smith, 2 Salk. 642; supra, 70; and see B. N. P. 18; Gilb. C. P. 154.

(1) [In *Hannen v. Edes*, 15 Mass. Rep. 347, where in an action of trespass for an assault and battery, the defendant pleaded that as master of a ship he moderately chastised the plaintiff, who was a mariner on board the same ship, for disobedience of orders, and averred it to be the same beating, &c., and the plaintiff replied *de injuria propria*, &c., on which issue was joined; it was decided that the plaintiff, under this issue, might prove that the beating was excessive, and disproportioned to the offence committed—and that such excess need not be replied specially. See also *Sampson v. Smith*, 15 Mass. Rep. 365.]

der the replication *de injuria* justify that assault ; he ought to plead the justification specially (z) (2).

* If the defendant justify in defence of his wife, child, or servant, the proof of course varies accordingly, and he must show that the assault and battery was committed in their defence (a). So a child may justify in defence of a parent, or a wife in defence of her husband (b), or a servant in defence of his master ; but he must both allege and prove that the plaintiff would have beaten his master if he had not interposed (c).

If the defendant justify the battery in defence of the possession of his property, and issue be joined upon the plea of *de injuria*, &c. it is of course incumbent on the defendant to prove the substance of his plea.

Where a request to the plaintiff to depart is essential to the defence (d) in point of law, the request must be proved as alleged. But the allegations in the plea are divisible ; and if a request to depart be not essential to the justifica-

PART
IV.

* 1475

In defence of
wife, &c.

De injuria.
Defence of
possession.

(z) *King v. Phipard*, Carth. 280 ; where to a plea of *son assault demesne* the plaintiff replied that the defendant entered the plaintiff's house, and misbehaved himself, whereupon he gently put him out ; and it was held that the replication was good, and that the plaintiff could not give such new matter in evidence under the general replication *de injuria*, &c. See *Sayre v. The Earl of Rockford*, 2 Bl. Rep. 1165. B. N. P. 18.

(a) 2 Roll. Ab. 546 ; Bro. Tr. pl. 128. But see 1 Ld. Raym. 62 ; B. N. P. 18.

(b) 2 Roll. Ab. 546 ; 1 Ld. Raym. 62 ; 1 Salk. 407.

(c) *Barfoot v. Reynolds & another*, 2 Str. 953.

(d) If *A.* enter *B.*'s close, *B.* may remove him, but must first request him to depart, 2 Roll. Ab. 548 ; 2 Inst. 316 ; and if *A.* resist, any degree of force which is necessary for the purpose of removal is justifiable. *Ibid.* ; but if the entry be forcible, a request is unnecessary, *Green v. Goddard*, 2 Salk. 641. [*McIlvoy v. Cockran*, 2 Marsh. (Ken.) Rep. 276.] So the defendant may justify the *mollis impositio* in the protection of a personal chattel, without making any previous request (Selw. 28). But the plea of *mollis impositio* is no answer to a charge of striking the plaintiff many blows, and knocking him down. *Gregory & Uz. v. Hill*, 8 T. R. 299. [*Gates v. Lounsbury*, 20 Johns. 427. *Ford v. Logan*, 2 Marsh. (Ken.) Rep. 325. *Everton v. Hayward & al.* Metcalf's Digest, 370. Sayer, 138.]

(2) [In *Curtis v. Carson*, 2 N. Hamp. Rep. 539, which was trespass for an assault, &c., the defendant pleaded *son assault demesne*, and the plaintiff replied *de injuria propria*, &c., on which issue was joined ; it was held that the plaintiff might show that the assault, which the defendant made, was outrageous and excessive, and unnecessary to his defence. See 1 Chit. Pl. 563, note (a).]

PART
IV.Defence of
property.

* 1476

De injuria.

License.

tion in point of law, it need not be proved, although it be alleged.

Where the defendant justifies the destruction of the plaintiff's property in defence of his own, he must both allege and prove that he could not otherwise preserve his own property (e). Where a justification of the killing of the plaintiff's dog alleged that the dog * was worrying and attempting to kill a fowl of the defendant's, and could not otherwise be prevented, it was held that it was necessary to prove that the dog when shot was in the very act of destroying the fowl (f).

Where issue is taken on a plea of license, the proof is also incumbent on the defendant (1). Whether the license proved affords a sufficient justification, is a question of law (g).

The keeping open the doors of a house in which a public billiard-table is kept, is evidence of a license in fact to all persons to enter for the purpose of playing (h).

Where the declaration was for several trespasses, plea that they were committed by license of the plaintiff, replication that the defendant, of his own wrong, and without

(e) *Vere v. Lord Cawdor*, 11 East, 568; and *Wright v. Ramscot*, 1 Saund. 84. *Jansen v. Brown*, 1 Camp. 41.

(f) *Janson v. Brown*, 1 Camp. 41.

(g) [See Clayt. 100. pl. 168.] If a person be licensed to do an act, he may do every thing without which the act cannot be done (*Bennet v. Grover*, Willes, 195). There is a distinction between a license for pleasure and a license for profit; the former is personal (13 H. 7. 13; Finch, 16, 17); but in the latter case the person licensed may take others with him to exercise the right. 13 H. 7. 13; M. 13 H. 7. 10; Willes, 197.

Where the gist of the action is the breaking and entering of the plaintiff's house, a license to enter will be a bar to the action, although the debauching of the daughter be laid in aggravation. 2 T. R. 166.

A landlord undertakes to let the house in the absence of the tenant, the person with whom the key was left having absconded; the landlord, in order to show the premises, puts up a ladder to the window, and forcibly opens it; the house having been robbed shortly afterwards, trespass lies for breaking and entering, and leaving the premises unsafe. *Ancaster v. Milling*, 2 D. & R. 714.

(h) *Ditcham v. Bond*, 3 Camp. 525. And if the license be abused, the plaintiff must new assign. Ibid. *Semble*, as this was a mere license in fact, the defendant could not become a trespasser *ab initio*; *supra*, 1445.

(1) [Evidence of a lease from the plaintiff will not support a plea of license. *Johnson v. Carter*, 16 Mass. Rep. 443.]

the *cause* (i) alleged, committed the several trespasses, &c. and evidence was given of a license which covered some but not all of the trespasses proved, it was held that the evidence did not sustain the justification on the issue taken by the replication; that it was to be understood *reddendo singula singulis*; * and the effect of the plea was to deny a license co-extensive with the trespasses complained of (k).

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IV.

De injuria.

* 1477

If the defendant plead a license in law, and the plaintiff rely upon some subsequent act of the defendant which renders him a trespasser *ab initio*, the plaintiff must plead it, and cannot give it in evidence on issue taken upon the plea of license (l).

License.

If the defendant justify, as preventing a tortious act by the plaintiff, and the latter rely on a license, he cannot give it in evidence under the general issue *de injuria*, but must reply the license specially (m).

An entry by virtue of process must usually be pleaded (n), with all the circumstances essential to the justification, and the evidence must of course depend upon the nature of the issue taken.

Process.

If the defendant plead a justification of his entry by virtue of process, and the replication, admitting the process, deny the residue of the justification, and the defendant show that in point of fact he was armed with process which authorized him to do the act complained of, it cannot be left as a question for the Jury, to say whether the defendant did not commit the act for some other cause (o), although he declared at the time that he entered the plaintiff's premises for a different purpose (p).

Wherever there is reason to apprehend that the defen-

(i) The *cause* in such a case is the *matter of excuse* alleged, and the replication in effect denies an excuse co-extensive with the trespasses.

(k) *Barnes v. Hunt*, 11 East, 451.

(l) *Sitkenhead v. Blades*, 5 Taunt. 198. [1 Marsh. 17. S. C.] *Taylor v. Cole*, 3 T. R. 296: 1 H. B. 555; *supra*, 1472; *infra*, 1480.

(m) *Taylor v. Smith*, 7 Taunt. 156.

(n) See *Ratcliffe v. Burton*, 3 B. & P. 223. In many instances, as has been seen, magistrates and officers of justice may prove their defence under the general issue.

(o) *Crowther v. Ramsbottom*, 7 T. R. 654.

(p) *Ibid.* A man may distrain for rent, and avow for heriot service. *Ibid.* per Lord Kenyon, Fitz. Avowry, 232; 3 Co. 26. *Dr. Grenville v. College of Physicians*, 12 Mod. 386.

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IV.

De injuria.
Process.

New assign-
ment.

dant was armed with a warrant so as to bring * the case within the stat. 24 Geo. II. c. 44, or any similar statute made for the protection of particular persons, notices should be given, and a demand made accordingly (q).

A justification by a magistrate, constable, or other peace-officer, or private person acting either with or without warrant, has already been considered (r). A private person may justify an act done for the purpose of preventing the commission of a felony (s).

9. In general, where a special justification is pleaded, a new assignment, or replication of excess, admits the cause of justification as alleged. If the plaintiff in trespass *quare clausum fregit* merely new-assign, and the defendant plead the general issue to such new assignment, the plaintiff waves all trespasses in the place mentioned in the bar (t).

The defendant pleaded that the *locus in quo* was part of a common field, which had been allotted to him by the leet jury of the manor, and the plaintiff new assigned the trespasses in closes, setting out the abutments, alleging them to be different closes from the defendant's allotment, and the defendant pleaded not guilty to the new assignment. It appeared upon the trial that they were the same; and it was held that the defendant was entitled to a verdict upon the new assignment (u).

If the plaintiff new-assign that the trespass was committed on another and different occasion than that which is justified, he thereby admits that one trespass is justified; and therefore, if there be but one trespass, the plaintiff will fail upon the new assignment, although if issue had been taken on the justification, * it could not have been established in fact. Thus, where the defendant justified an imprisonment under a writ sued out by him as attorney to J. M., which was delivered to the sheriff, who, by virtue thereof, arrested the plaintiff, and the plaintiff new assigned that the trespass complained of was committed upon another and different occasion from that stated in the plea, and after the supposed arrest therein mentioned; it was held that the defendant was entitled to a verdict, on evidence of the facts, although the arrest was made irre-

* 1479

(q) *Supra*, 792.

(r) *Supra*, tit. *Justices*, 792.

(s) *Hancock v. Baker*, 2 B. & P. 260; 2 Roll. Ab. 550.

(t) *Cro. Eliz.* 492; B. N. P. 92.

(u) *Pratt v. Groomé*, 15 East, 235.

gularly by the bailiff, and without any warrant from the sheriff (x).

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IV.

So where in trespass against *A.* and *B.*, the declaration contained two counts, and the defendants pleaded not guilty to both, and justified an arrest upon mesne process, and the plaintiff new-assigned a subsequent arrest made after he had been released from the first imprisonment by *B.* with the consent of *A.*, and the plaintiff failed in the proof of his new assignment for want of proving the assent of *A.*, it was held that he could not prove the same trespass against *B.* under the second count; for the justification of one trespass had been admitted, and the plaintiff could not avail himself of the same act of imprisonment both on the new assignment and also on the second count (y).

New assign-
ment.

And it is to be observed generally, that where there are as many counts as assaults in fact, and there are special justifications to some or all, a new assignment is never necessary; for the plaintiff may go into evidence of all, and will be entitled to recover in respect of all which are not justified both in allegation and proof. Whereas, by a new assignment he admits one * assault to be justified, and should he fail in proving more assaults than are admitted, the defendant would be entitled to a verdict, although, had the plaintiff traversed the justifications, the defendant might not have been able to establish them in law or fact. * 1480

The plaintiff cannot under a new assignment prove that the sheriff continued in possession after the return-day of the writ; for, although he becomes a trespasser *ab initio*, it is not a new trespass (z).

A replication of excess admits the cause of justification, and precludes the plaintiff from going into evidence to negative the justification (a). Thus, if the defendant justify as abating a nuisance, and the plaintiff reply excess, he cannot go into evidence to negative the nuisance (b). If the replication deny the excess, the proof of the issue is on the plaintiff. Excess.

Upon a justification of cutting ropes for the purpose of disengaging two vessels which had run foul of each other, and issue taken on a new assignment of excess, it was

(x) *Oakley v. Davis*, 16 East, 82.

(y) *Atkinson v. Matteson*, 2 T. R. 176.

(z) *Aitkenhead v. Blades*, 5 Taunt. 198. [1 Marsh. 17. S. C.]

(a) 1 Starkie's C. 56.

(b) *Pickering v. Rudd*, 1 Starkie's C. 56. [4 Camp. 219. S. C.]

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IV.Excess.
New assign-
ment.

held that the plaintiff must prove a clear excess, and unnecessary injury (c).

Where, in an action for an assault and false imprisonment, the defendant justified as acting under the warrant of the Speaker of the House of Commons, and issue was joined upon an alleged excess of the officer who executed the warrant, in using such a military force as was improper, excessive and unnecessary for the purpose, and breaking into the plaintiff's house; evidence was admitted of acts of violence committed by the mob in parts adjacent, though out of view and hearing of the plaintiff in his house, but who * appeared to be actuated by the same intentions with those who were near the plaintiff's house, for the purpose of showing the danger and difficulty of executing the warrant by force against the plaintiff in his own house without the aid of the military (d).

* 1481

Trespass ab
initio,

Where the plaintiff brought trespass for pulling down a gate, plea a right of way, &c. replication that the defendant subsequently converted the gate, upon issue joined on the conversion, it was held that evidence that the defendant laid the gate on his own land, where the plaintiff might take it, did not prove a conversion (e).

Some observations have already been made upon the competency of witnesses in actions of trespass (f).

TROVER.

1. Proof of property in the plaintiff.—General or special.—Of title in detail.—When necessary.—How proved.—Direct and presumptive evidence of.—Proof of strict title, when unnecessary.—Reference to the time of conversion.—Variance.
2. Of the conversion.—Direct proof.—Presumptive proof.—Variance.
3. Of damages.
4. Proofs by the defendant.

In this action it is essential to prove, 1st. Property in the plaintiff (g), and a right of possession at the time of

(c) *Hockless & another v. Mitchell*, 4 Esp. C. 86.

(d) *Burdett v. Colman*, 14 East, 183.

(e) *Houghton v. Butler*, 4 T. R. 364.

(f) *Supra*, 764.

(g) Per Lord Mansfield, in *Cooper v. Chitty*, 1 Burr. 31.

the conversion by the defendant; 2dly. A conversion by the defendant; and 3dly. The value of the chattel.

Property in a chattel is either absolute or special, * and the evidence to prove it is either direct and positive or it is presumptive. It is sufficient if the plaintiff has a special property in the goods; and it seems that any temporary interest in the goods, either in his own right, and for his own use, or by authority of law for legal purposes, coupled with the right to take and keep possession, or to maintain a possession already subsisting, is sufficient (1). Thus, if a party having a temporary interest in the possession of a chattel deliver it to the owner for a special purpose, he may, after that purpose has been answered, if the owner refuse to deliver it up, maintain trover (h).

So bailees of goods (i) (2), as carriers, factors, consignees, pawnees, trustees (k), agisters of cattle (l), one who borrows a horse to till his land (m), churchwardens, in respect of goods the property of the parishioners (n), may maintain this action against one who converts the property (3).

Where the house of a lessee for life is blown down, he may maintain trover against one who takes the materials;

(h) *Roberts v. Wyatt*, 2 Taunt. 268.

(i) Bro. Tres. 92; 1 Ld. Raym. 275; B. N. P. 33; 1 Mod. 31; 1 Str. 505.

(k) 1 Roll. Ab. 4; B. N. P. 33; 2 Will. Saund. 47, a.

(l) Bro. Tres. 67.

(m) Ibid.

(n) *Dent v. Prudence*, 2 Str. 852. *Attorney General v. Ruper*, 2 P. Wms. 126; 2 Will. Saund. 47, c.

(1) [In Massachusetts, a depositary to whom an officer has entrusted goods attached, taking his receipt and a promise to re-deliver on demand, is held to be a mere servant of the officer, having no special property in the goods, and therefore not entitled to maintain any action against a wrong-doer. *Ludden v. Leavitt*, 9 Mass. Rep. 104. *Warren v. Leland*, *ibid.* 265.

Secus, in New Hampshire. *Poole v. Symonds*, 1 N. Hamp. Rep. 289, and *Eastman v. Eastman*, there cited.]

(2) [A bailee of yarn, who is to procure it to be made into cloth for a commission, has such a property in it as will entitle him to maintain trover against any one who wrongfully takes it from his agent or servant to whom he delivered it to be woven. *Eaton & al. v. Lynde*, 15 Mass. Rep. 242.]

(3) [In *Chesley v. St. Clair*, 1 N. Hamp. Rep. 189, it was decided that in an action of trover by the bailee of a chattel against a stranger, the bailor is not a competent witness for the bailee, to prove the general property to be in himself.]

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* 1482

Right of property and possession.

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for he has a special property in them for the purpose of rebuilding the house (o).

- * 1483 A special property, which may be sufficient as against a stranger, gives no right against one who has the general property (p). A carrier, or the depositary of goods for safe custody, may, by reason of special property, * maintain trover against a stranger; although he could not succeed against an owner or co-proprietor (r).

Title when
necessary to
be proved.

In general, possession of a chattel is *prima facie* evidence of property in the possessor; but if the plaintiff has never had possession of the chattel, or if the contest be not with a mere stranger, but with one who will succeed in his proof of title unless the plaintiff can prove a better, it is necessary for the latter to resort to strict evidence of title.

In the first place, where the plaintiff has not had actual possession, he must resort to proof of his title, in order to show his right of possession; as by evidence of the transfer of a ship by means of the proper documents (s); or of a title to any other chattel by purchase, where there has been no delivery (t); or of his title as executor under a will, where the conversion was previous to the taking of actual possession, which must be proved by means of the probate (u); or of his title as lord of a manor to a wreck or estray which has been converted by the defendant before seizure by the lord (x).

If during an estate in trustees *per autre vie*, a tree were to be cut down, the property would vest in the owner of the inheritance, and he might maintain trover against one who converted it; but in such case, if he had not actual possession before the conversion, proof of his title to the inheritance would, it seems, be requisite (y).

- * 1484 * Where A. was indebted to B., and B. to C., and it was

(o) 2 Will. Saund. 47, a.

(p) *Holliday v. Cammell*, 1 T. R. 658.

(r) *Ibid.*

(s) *Supra*, 1150.

(t) See tit. *Vendor & Vendee*.

(u) 2 Will. Saund. 47, a.; Latch, 214; cited by Lawrence, J. 7 T. R. 13.

(x) 1 T. R. 480. F. N. B. 91.

(y) *Blaker v. Anscombe*, 1 N. R. 25. So if trees be felled during a lease, the landlord may maintain trover (*Berry v. Heard*, Palm. 327, cited 7 T. R. 13); but a tenant in tail cannot maintain trover for trees cut during the life of a tenant for life without impeachment of waste. *Pyne v. Dor*, 1 T. R. 55. [See *Mather v. Trinity Church*, 3 Serg. & Rawle, 515.]

agreed between the parties that goods in *A.*'s possession should be delivered to *C.* in satisfaction of the debt, and *A.* afterwards converted the goods to his own use, it was held that trover was maintainable by *C.* (*a*).

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Title when
necessary.

In such a case, proof of the special circumstances would be necessary, and is essential in all cases where the plaintiff claims by virtue of his title, independent of actual possession, &c.

Next, where there is a conflict as to the title and right of possession between parties, such that the title of either would prevail in the absence of proof of title and right of possession in the other, it is usually necessary to go into evidence of title, and is not sufficient to rest upon proof of mere possession: as in cases of disputed titles between vendors and purchasers of personal chattels (*b*), or their assignees (*c*), or between the sheriff and the owner of property, or his assignees under a commission of bankruptcy (*d*).

Conflicting titles.

Direct evidence of title in detail consists of course in the proof of the documents and circumstances which are essential in point of law. As by proof of the different steps of bankruptcy and the assignment, where the suit is by the assignees. By the probate or letters of administration, in the case * of an executor or administrator, or by agreement (*e*). By proof of a gift accompanied with a delive-

Evidence of
title.

* 1485

(*a*) *Flewelling v. Rave*, 1 Bulst. 68.

(*b*) *Infra*, tit. *Vendor & Vendee*.

(*c*) *Supra*, tit. *Bankrupt*, 141; and *infra*, tit. *Vendor & Vendee*.

(*d*) *Supra*, tit. *Sheriff*. [*Lovett v. Cutler*, 1 Mass. Rep. 67.]

(*e*) Property vests by agreement without delivery. If *A.* be indebted to *B.* and *B.* to *C.*, and it is agreed that *A.* shall deliver goods to *C.* in satisfaction of *B.*'s debt, the right vests in *C.* B. N. P. 35. 1 Bulst. 68.

But one who contracts for a chattel to be made acquires no property till delivery, although he pays the whole price in advance. *Mucklow v. Mangles*, 1 Taunt. 318. [See *Fonville v. Casey*, cited *Infra*, 1494, note (2).]

A custom that calico printers shall take damaged prints does not alter the property without the consent of the owner. *Laclouch v. Twile*, 3 Esp. C. 114.

A conditional delivery does not vest property. If *A.* sell goods to be paid for on delivery, and *A.*'s servant deliver them without receiving the money, *A.* may, after a demand and refusal, maintain trover. 2 B. & A. 329. n. And where *A.* contracted to deliver iron to *B.* the latter agreeing to withdraw from circulation certain bills outstanding against *A.*, and after delivery of part of the iron the bills were not withdrawn; and the Jury found that the delivery of the iron and withdrawing of the bills were to be cotemporary, it

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ry (*f*); or exchange (*g*); or sale (*h*), or pawning of the
* goods (*i*); or of an assignment by the owner or his agent
having competent authority (*k*).

* 1486

was held that *A.* might maintain trover for the iron delivered. *Id.*
See *Bishop v. Skillico*, 2 B. & A. 329, n.

Where an out-going tenant has covenanted to leave the manure
on the farm, and to sell it to the in-coming tenant at a valuation to
be made by certain persons, the effect is to give the outgone tenant
a right of on-stand for the manure on the farm, and the property
and possession remain in him in the mean time. *Beaty v. Gibbons*,
16 East, 116.

A prior incumbrancer takes an assignment of a lease, which is
duly registered, but through ignorance and mistake leaves it in the
possession of the mortgagor, who surrenders it, and takes a new
lease at an increased rent, the plaintiff may (in the absence of fraud)
recover the original lease in trover. *Bailey v. Fernor*, 9 Price, 263;
see *Evans v. Bicknell*, 6 Ves. 174; *Barnett v. Weston*, 12 Ves. 130.

(*f*) A verbal gift of a chattel does not pass the property without
delivery. *Irons v. Smallpiece*, 2 B. & A. 551. [*Cook v. Husted*, 12
Johns. 188. *Noble v. Smith*, 2 Johns. 52. *Pearson v. Pearson*, 7
Johns. 26. *Grangiac v. Arden*, 10 Johns. 293.]

(*g*) If *A.* and *B.* exchange bills, *A.* cannot maintain trover to re-
cover the bill which he has delivered, although *B.*'s security be dis-
honoured. *Hornblower v. Proud*, 2 B. & A. 327.

(*h*) Property is not altered by a sale unless it be in market-overt.
As if goods be sold on a wharf in Southwark by the wharfinger
without leave of the owner. *Wilkinson v. King and others*, 2 Camp.
335. [See *Wilson v. Rucker*, 1 Call, 500. S. P.]

See tit. *Vendor and Vendee*.

Property is altered by a sale by the sheriff under an execution
against the goods of the owner, although the judgment itself be er-
roneous, and be reversed by writ of error. *Matthew Manning's*
case, 8 Co. 94; 1 Burr. 35. [Yelv. 42, *a.* and cases there cited.]

[*Secus*, if the property sold did not belong to the judgment-debt-
or. Yelv. 180, *a. note*.]

(*i*) Where goods obtained by fraud are pawned without notice,
although the owner prosecute the offender, on conviction he is not
entitled to restitution by virtue of the statute. *Parker v. Patrick*,
5 T. R. 175. See *Horwood v. Smith*, 2 T. R. 750.

Where goods stolen are pawned, the property is not changed,
even in London. *Packer v. Gillies*, 2 Camp. 336. n. It is provided
by the stat. 1 J. 1. c. 21, that the sale of goods wrongfully taken to
any pawnbroker in London, or within two miles thereof, shall not
alter the property.

(*k*) An agent with a limited authority cannot confer an interest
beyond the extent of that authority. If *A.* deliver lottery tickets to
a goldsmith to receive money for them, and the latter deliver them
to *B.* in discharge of a contract between himself and *B.*, the pro-
perty is not changed. 1 Salk, 284; B. N. P. 34. So an agent who
receives money for his principal cannot transfer it by way of gift.
1 Salk. 289; B. N. P. 35.

Secus in the case of a negotiable instrument which passes by de-
livery. The owner of an exchequer bill (the blank not being filled

Where a vendor has delivered goods to a carrier, * which are converted by a stranger, either the owner or the carrier may maintain trover; the carrier, by virtue of his interest as a bailee (l); the owner, by reason of his title; not having parted with the right of possession. But whether the vendor or vendee is the owner, and entitled to bring trover, usually depends upon the nature of the contract between them (m). * 1487 Proof of title.

up), placed it in the hands of J. S. for sale. J. S. deposited it at his banker's, who made advance to the amount; held, that the property in the bill passed by delivery, as in cases of bank notes and bills of exchange. *Wookey v. Pole*, 4 B. & A. 1.

But if a negotiable security be delivered by the owner to another, for the purpose of raising money, and it passes into the hands of one who receives it without consideration, the property is not altered, and the owner may maintain trover against the holder. Thus, if A. indorse a bill drawn in his favour, and accepted by B. in order that he may receive money upon it for A. by negotiating it, and B. gives it to C., who puts it into the hands of D. without consideration, two years after the bill is due, A. may maintain trover against D. *Goggerley v. Cuthbert*, 2 N. R. 170.

If A. supply B. with money for a specific purpose, and B. in violation of the trust buys another chattel with the money, as a horse for his own use; A. may maintain trover for the horse against B. or his assignees under a commission of Bankrupt. *Assignees of Walsh v. Plomer*.

A delivery of a chattel by an agent authorized to sell it to his own agent for the purpose of sale is not a conversion. 2 B. & P. 438.

(l) *Daves v. Peck*, 8 T. R. 330, although the vendor pay for booking. *Ibid*.

(m) Where goods are ordered from a tradesman to be sent by a particular carrier, the delivery to the carrier or his agent vests the property in the vendee. *Daves v. Peck*, 8 T. R. 330; *Dutton v. Solomonson*, 3 B. & P. 583; *King v. Meredith*, 2 Camp. 639; B. N. P. 35, 6; 1 Salk. 18. *Secus*, where the goods are delivered by mistake to a mere stranger, 1 Salk. 18; B. N. P. 36. So the goods vest in the vendee by the delivery to a carrier not named, after a general order. B. N. P. 36; *Godfrey v. Furzo*, 3 P. W. 186. And per Ld. Alvanley in *Dutton v. Solomonson*, 3 B. & P. 584. And per Ld. Hardwicke in *Snee v. Prescott*, 1 Atk. 248; *Copeland v. Lewis*, 2 Starkie's C. 38. Although the goods be sent on condition that the vendee may reject them if he dislikes them. B. N. P. 36; cites *Haynes v. Wood*. Per Herbert, J. Surrey, 1686. And he will be bound to pay the price if the carrier keep them. *Ib*. And he only could recover against the carrier; *Ib*. unless the vendor can establish fraud as between the carrier and the vendee, as, that it was agreed between them that the carrier should keep the goods to satisfy a debt due to him from the vendee, who was about to abscond; for if there was no intention on the part of the carrier to deliver the goods to the vendee, he never accepted them for the vendee, and the property never vested in the latter, but remained in the vendor. *Ib*. And the question of fraud is for the Jury. *Ib*. But if the vendor engage to deliver the goods to the vendee the

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Possession.

Possession
when
sufficient.

* In general the right of property draws after it the possession. But even in the case of special property the special owner may sometimes maintain trover, although he has not had actual possession. Thus, a factor to whom goods have been consigned, but who has never received them, may maintain the action (n). But in other cases of special property possession is often essential, as in the case of a sheriff, who has no special property in goods to be taken in execution, before seizure.

If the action be brought against a mere wrong-doer, the mere fact of possession by the plaintiff is usually sufficient evidence of title, even although the plaintiff claim under a title which is defective. For the possession of property is, as has been seen, *prima facie* evidence of ownership (o).

And bare possession is *prima facie* sufficient against a mere wrong-doer. Thus, one who finds a jewel may maintain trover against any one who converts it, except * the owner (p). For the title depending upon possession, however recent, must prevail against a mere wrong-doer who cannot rebut it. So an uncertificated bankrupt may maintain trover for goods acquired since his bankruptcy against all but his assignees (q). Again, where the plaintiff had

* 1489

carrier is the agent of the vendor, who is liable to the risk. *Vale v. Bayle*, Cowp. 294. If the vendor agree with the carrier to pay him for the carriage, the vendor may maintain an action on the contract, for there the property is out of the question. *Davis v. James*, 5 Burr. 2680; *Moore v. Wilson*, 1 T. R. 659.

(n) Per Eyre, C. J. in *Fowler v. Down*, 1 B. & P. 47. And see 2 Will. Saund. 47. d. [See *Thorp v. Burling*, 11 Johns. 285.]

(o) Per Ld. Kenyon in *Webb v. Fox*, 7 T. R. 397; *Sutton v. Buck*, 2 Taunt. 302; *Robertson v. French*, 4 East, 130; *Thomas v. Fyde*, 5 Esp. C. 88; *Abbott's L. S. 73*; *supra*, 1190. 1150; in *Sheriff v. Cadell*, 2 Esp. C. 617, where the plaintiff produced the ship's register, which showed that the property was in a third person, and failed in proving an assignment to himself for want of the attesting witnesses, Ld. Kenyon held that he could not afterwards resort to evidence of possession. This case seems however to be virtually overruled. See the cases above cited. If the plaintiff had inadvertently shown that the property was in another at the time of the conversion, the presumption arising from mere possession must have yielded to the positive proof; but the previous ownership of another is not inconsistent with property in the plaintiff at the time of the conversion. [See 2 Phil. Ev. 121.]

(p) *Armory v. Delamirie*, 1 Str. 505; 2 Saund. 47. a.; *supra*, 1436.

(q) *Webb v. Fox*, 7 T. R. 391. And the cases there cited, and *Fowler v. Down*, 1 B. & P. 44; *Chippendale v. Tomlinson*, Cooke's B. L. 260; *Evans v. Brown*, 1 Esp. C. 170; *Laroche v. Wakeman*, Peake's C. 140; *Silk v. Osborn*, 1 Esp. C. 140. [See *Kirwan v. Latour*, 1 Har. & J. 289.]

possession of a ship under a transfer which was void for want of compliance with the register-acts, it was held to be a sufficient title against a stranger who seized part of the wreck of the ship (r).

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* It may be observed in general, that where there is any doubt as to the possession of the identical goods in question, it is requisite to be prepared with evidence to show the plaintiff's title, and to establish the identity of the goods by evidence of his purchasing them from a former

* 1490
Possession
where sufficient
evidence.

(r) *Sutton v. Buck*, 2 Taunt. 302. In trover for a quantity of rushes, it was proved that the plaintiff being possessed of a cottage at T, and an inhabitant there, and as such claiming a right to cut rushes upon T. common for his own use, cut down about five or six loads of rushes, which the defendant seized and carried away. The judge nonsuited the plaintiff, but a rule having been obtained why there should not be a new trial, the Court set aside the nonsuit, and said this is such evidence of property in the plaintiff, and conversion in the defendant, that they appear to be wrong-doers, for they have neither by evidence nor pleading shown any right or title whatever to these rushes, and appear to the Court to be mere strangers. Indeed if a person hath no colour of right at all to cut down rushes, or to take any other thing, he cannot, by cutting the rushes or taking the thing without any colour of right, acquire property therein. But in the case at bar, the plaintiff proved he had a right to cut the rushes; that he did cut them; and we are all of opinion that he thereby gained a property therein. *Rackham v. Jerup*, 3 Wils. 332. In the case of *Basset v. Maynard*, Cro. Eliz. 819, Sir T. Palmer, being seised of a great wood, granted to Cornford as many trees as would make 600 cords of wood. Cornford assigned his interest to the plaintiff. Afterwards Sir T. Palmer granted to the defendant so many trees as would make 4,000 cords of wood, to be taken at his election. The plaintiff, by the assignment of Sir T. Palmer, cut down the trees in question, and the defendant, claiming by virtue of his grant, took them; and it was found that there was sufficient wood left for the defendant. And it was held that the action was maintainable even admitting the grant to the plaintiff to have been void; for by the cutting down of them he had possession, and a good title against the defendant and every stranger; and being cut down it was not lawful for the defendant to take them. For if one sell 1,000 cords of wood, to be taken at the vendee's election, and afterwards the grantor himself, or a stranger, cut down some of the wood, the grantee cannot take that which is cut down, but ought to make his grant good out of that which is growing. So, where in trespass for taking and dispersing a load of fern ashes, the defendant pleaded a right of common, and of cutting fern in a particular place in which the plaintiff wrongfully cut fern, and burnt it, whereupon the defendant scattered it, as well he might: On demurrer to the plea, the Court held, that if the plaintiff did him any damage he might have brought his action; but after the plaintiff had burnt the fern, and thereby acquired possession of it, a commoner had no right to disperse it. *Woodson v. Newton*, 2 Str. 777. So it has been held that a waterman's widow might maintain trover for the earnings of her apprentice *de facto*. 2 Will. Saund. 47. a.

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IV.

Title presump-
tive evidence.

* 1491

Right of pos-
session at time
of conversion.

Variance,

owner, or in market-overt, or otherwise; and also with proof of the bill of sale, or bills of parcels, lading, &c. (s), or of other documents describing the chattels and accompanying the transfer.

Where the plaintiff brought trover to recover the value of certain bank notes which had been found by the defendant in a pocket-book, and it was proved that the notes had been delivered out by a banker's clerk in exchange for a cheque payable to the plaintiff or bearer, and there was no evidence that the cheque had been ever negotiated, or that any claim to the notes had been made on behalf of any other person, it was held to be presumptive evidence of title in the plaintiff (t).

* Again, the right of possession must exist at the time of the conversion. Thus, the owner of goods who has parted with the right of possession by letting them to a tenant for a term, cannot maintain trover against the sheriff for seizing them under an execution during the term (u). And if goods stolen be purchased in market-overt, and sold by the purchaser before the conviction of the felon, the owner cannot recover by virtue of the statute against such purchaser, for the sale in market-overt changed the property; and the plaintiff's title to possession under the statute 21 H. VIII. c. 11, did not accrue till the conviction, consequently he had no title at the time of the conversion (x).

The property, it seems, need not be described with great minuteness, but if it be precisely described a variance will be fatal (y). As, if a written instrument be described by the date, sum, parties, and other particulars (z). Notice to produce the instrument is unnecessary (a). A

(s) *Supra*, 308.

(t) *Greenstreet v. Carr*, 1 Camp. 551.

(u) *Gordon v. Harper*, 7 T. R. 12. *Pyne v. Dor*, 1 T. R. 55; Cro. Car. 242; 3 Lev. 209; Palm. 327.

(x) *Horwood v. Smith*, 2 T. R. 750.

(y) B. N. P. 37; Cro. Car. 262. [See *Little v. Gibbs*, 1 Southard's Rep. 211.]

(z) *Wilson v. Chambers*, Cro. Car. 262; 3 B. & P. 145, 6; 1 Esp. C. 50. See tit. *Variance*. [*Bissel v. Drake*, 19 Johns. 66. *Van Nankin v. Wickham*, 2 Southard's Rep. 509.] A conversion alleged of an assignment, purporting to be a conveyance from, &c. is proved by evidence of a lease and release. *Harrison v. Vallance*, 1 Bing. 45.

(a) *How v. Hall*, 14 East, 274. [*McClellan v. Hertzog*, 6 Serg. & Rawle, 154. *The People v. Holbrook*, 13 Johns. 90. *Ross v. Bruce*, 1 Day, 100.] For the action is notice. But see 3 T. R. 306; 3 B. & P. 143.

variance from the means or manner in which the goods are alleged to have come into the defendant's possession is immaterial, for this is but inducement, and need not be proved (b).

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IV.

Title.—
Variance.

A variance as to the number of owners will not be material except so far as regards the damages, provided the plaintiff be an owner, for the non-joinder is pleadable in abatement only (c); and the plaintiff may * declare on his own possession and prove his title as assignee of a bankrupt executor, &c. (d). But if he declare as assignee of *A. B. and C. bankrupts*, and the declaration contain but one count on a joint possession by the three, he cannot recover in respect of property which belonged to *A.* alone and not to the three jointly, but only in respect of property which belonged to the three jointly. But had the declaration contained a count stating possession in the assignee he might have recovered the whole, as it was a joint commission, and the assignment passed both separate and joint effects (e).

* 1492

If the plaintiff declare as the assignee of *A.* the allegation is proved by a joint commission against *A.* and *B.* (f).

2dly. A conversion by the defendant. The conversion is the gist of the action; the manner in which the goods came into the hands of the defendant is mere inducement, and need not be proved (g). A conversion seems to consist in any tortious act by which the defendant deprives the plaintiff of his goods, either wholly, or but for a time (h). What act will amount to a conversion when proved is a question of law. The proof is either direct or presumptive; direct, as by evidence that a carrier broke open a box intrusted to him for carriage (i), or that he sold the goods (k),

Conversion.

(b) 2 Bulst. 306. 313; Cro. Jac. 428; B. N. P. 33.

(c) *Supra*, 1064.

(d) B. N. P. 37.

(e) *Cock v. Tunno*, London Sitt. after Hil. 41 Geo. III. Cor. Ld. Kenyon, Sel. N. P. 1274.

(f) *Harvey v. Morgan*, 2 Starkie's C. 17.

(g) B. N. P. 33; *supra*, 1491, note (b).

(h) See *Keyworth v. Hill*, 3 B. & A. 685. As if *A.* take the horse of *B.* and ride him, and then deliver him to *B.* B. N. P. 46; 1 Danv. 41. So the wearing of a pearl is a conversion. *Ld. Petre v. Heneage*, 12 Mod. 519.

(i) 2 Will. Saund. 47. a.

(k) *Ibid.* [*Vickery v. Taft*, 1 Chip. Rep. 241. *Van Amringe v. Peabody & al.*, 1 Mason's Rep. 440.]

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IV.

Conversion.

* or that the defendant, without authority, forcibly took and carried away the goods (*m*), or injured them (*n*), or consumed part of them. As that the defendant drew out part of the liquor (*o*) delivered to him to be carried, or caused the plaintiff to pay money for the release of goods from a wrongful distress (*p*); or that a carrier delivered goods by mistake to a third person (*q*); or that the defendant took cattle by way of trespass, and drove them away (*r*). And if *A.* take goods, and *B.* take them from *A.*, it is a conversion by *B.* (*s*) (1).

So if a sheriff levy under a *fieri facias* after an act of bankruptcy has been committed by the defendant (*t*), he is

(*m*) *Baldwin v. Cole*, 6 Mod. 212; Holt, 707; 6 East, 540; B. N. P. 44; 2 Will. Saund. 47. a.

(*n*) 2 Will. Saund. 47. a.

(*o*) 1 Str. 576; Cro. Eliz. 219.

(*p*) *Shipwick v. Blanchard*, 6 T. R. 298.

(*q*) *Youl v. Harbottle*, Peake's C. 49; 3 Taunt. 117; *Syeds v. Hay*, 4 T. R. 260. [*Ostrander v. Brown & al.* 15 Johns. 39. *Decereaux & al. v. Barclay & al.* 2 B. & A. 704.]

(*r*) *Bruen v. Roe*, 1 Sid. 264. And see *Baldwin v. Cole*, 6 Mod. 212. Holt, 707.

(*s*) *Wilbraham v. Snow*, 1 Sid. 438.

(*t*) B. N. P. 41; 1 Salk. 108. *Cooper v. Chitty*, 1 Burr. 20; *Assignees of Potter v. Starkie*, in the Exchequer. See the stat. 49 Geo. III. c. 121; *supra*, 178. So although the sheriff levy before the assignment. *Lazarus v. Waithman*, 5 Moore, 313; see *Smith v. Miles*, 1 T. R. 481; *Lyon v. Lamb*, Fell on Guar. 260; *supra*, 171. If the sheriff seize before bankruptcy, and sell also to satisfy a second execution after bankruptcy, the assignees are entitled to recover the surplus in trover. *Stead v. Gascoigne*, 8 Taunt. 527.

One declared a bankrupt, on being called on by his assignees, delivers up his books; this is a compulsory delivery, and not being in fact a trader he may maintain trover, without a previous demand. *Sumersett v. Jarvis*, 3 B. & B. 2.

(1) [Any act of the defendant showing that he detains the property for any purpose not justifiable in itself is said (in *Ratcliffe v. Vance*, 2 Rep. Con. Ct. 241) to be sufficient evidence of a conversion.

If chattels are delivered by A. to B. for sale, and B. instead of selling them, appropriates them to his own use, and refuses to account for them, A. may maintain trover. *Barton v. White*, 1 Har. & J. 579. If the plaintiff purchase a quantity of light wood set as a tar kiln on the defendant's land, but not banked or turfed, and make a demand of it from the defendant, who threatens to sue him if he comes on the land for the purpose of carting it away—this is evidence of a conversion. *Nichols v. Newson*, 1 Car. Law Repos. 227. See *Yelv. 174, a. note* (1). *Infra*, 1497, note (1).]

guilty of a conversion ; and so is the plaintiff in the suit if he indemnify the sheriff (u).

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The mere abuse of a chattel by a bailee is no conversion (x) ; but if he use it contrary to the design of the bailment it is otherwise, as, if a man lend his horse to go to York and the bailee goes to Carlisle (y).

Conversion.

* Discounting a bill of exchange, made payable at the defendant's bank, writing a receipt upon it, and delivering it to the acceptor, after notice that it has been lost by the holder, is a conversion (z) (1). * 1494

A party may be guilty of a conversion in dealing with goods as his own, and preventing the owner from obtaining possession of them, although he has had but a constructive and not an actual possession. Thus, taking an assignment, by way of pledge, of tobacco lodged in the king's warehouse, from a broker, who had purchased it there in his own name for his principal, and a refusal to deliver it to the principal after notice and a demand made by him, no other but the person in whose name it is warehoused being able to take it out, is a conversion (a) (2).

(u) *Supra*, 170, 171.

(x) Gil. L. Ev. 265, 2d ed. Tri. per pais, 456.

(y) *Ibid.* 2 Bulst. 309. [*Wheelock v. Wheelwright*, 5 Mass. Rep. 104.]

(z) *Lovell v. Martin*, 4 Taunt. 799. Note; the bill had been drawn on a customer of the bank.

(a) *McCombie v. Davies*, 6 East, 538. See *Baldwin v. Cole*, 6 Mod. 212. Holt, 707.

(1) [A. having money to pay on account of B., at a certain day, on the suggestion of C., in order to raise the money for that purpose, made a note payable to B. and delivered it to him, and he gave it to C. who promised to obtain the money on the note from D. and pay it immediately to B. to be paid over to A. But C. on receiving the note, immediately passed it away to E. to pay a debt due to him from B. and C. as partners. The note having been discounted in a bank for E. who was ignorant of the foregoing agreement, A. paid and took up the note when it was due, and afterwards brought trover against C. to recover damages for the conversion of the note by him—and the action was sustained. *Murray & al. v. Busing*, 10 Johns. 172.]

(2) [In case of capture, if the assured abandon and receive the amount of the loss, and after condemnation the property be purchased by him, or his agent, the purchase shall enure to the insurer's benefit, if he so elect ; and if the property, thus purchased, be invested in other articles by such agent, and transmitted by him to his principal, who sells them, trover lies by the insurer ; for, by his affirmance of the agent's acts, he obtains an absolute property in the goods, and the subsequent sale by the insured amounts to a

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Conversion.

A. consigned to *B.* dollars to the use of the plaintiff, which *B.* deposited at the Bank for safe custody, and pledged the bill of lading to the defendant, who upon a sale of the dollars to the Bank received the value of the dollars, and it was held that he was guilty of a conversion (*b*) by the delivery of the bill of lading, which was the symbol of property, and the receipt of the value.

But it seems, that in general, evidence of some tortious act is essential to a conversion, and that it is not sufficient to prove mere non-feasance (*c*) (3). A refusal to deliver * 1495 up a deed by one who has it not in his * possession, is not a conversion, although he intended to convert it (*d*).

Where a party claiming a ship under a defective conveyance from a trader before his bankruptcy, sent her to sea, and she was lost on the voyage, it was held to be a conversion (*e*).

Where an action is brought by one tenant in common of an indivisible chattel against another tenant in common, it is not sufficient to show that the defendant took forcible possession of the chattel and carried it away (*f*), or that

(*b*) *Jackson v. Anderson*, 4 Taunt. 24. See *Bloxam v. Hubbard*, 5 East, 407. [See *Babcock v. Gill & al.* 10 Johns. 287.]

(*c*) See *Bromley v. Coxwell*, 2 B. & P. 438. As that an agent employed to sell goods under certain conditions has merely neglected to sell them. [See *Jenner v. Joliffe*, 6 Johns. 9.]

(*d*) *Smith v. Young*, 1 Camp. 439. Note; the deed was in the hands of the defendant's attorney, who had a lien upon it for a small sum of money.

(*e*) *Bloxam v. Hubbard*, 5 East, 406.

(*f*) *Barnardiston v. Chapman and another*, cited 4 East, 121. [*Daniels & al. v. Daniels & al.* 7 Mass. Rep. 135.] So, a member of an amicable society intrusted with a box containing the fund, who has given a bond for the safe custody, cannot maintain trover against another member of the society, and a stranger, who take away the box, for the members are tenants in common, and the plaintiff had

conversion. *United Insurance Company v. Robinson*, 2 Caines' Rep. 280; affirmed in Error, 1 Johns. 592.

In *Fonville v. Casey*, 1 Murphey, 389, it was held that an agreement for a valuable consideration to deliver to the plaintiff the first female colt which a certain mare owned by the defendant might foal, vested a property in the colt when foaled, and that the plaintiff might maintain trover for it. See *Mucklow v. Mangles*, *Supra*, 1485.]

(3) [When goods are deposited with a person, to be sold at not less than a certain fixed price, and the depositary sells them at a less price, the owner cannot maintain trover against him, but the remedy is by a special action on the case. *Sarjeant v. Blunt*, 16 Johns. 74. See also 3 Taunt. 117, *Dufresne v. Hutchinson*. *Cairnes & al. v. Bleeckers*, 12 Johns. 300.]

he changed the form of the chattel * by applying it to the use for which it was intended (g). But if the defendant, being tenant in common, destroy the chattel, it is a conversion, and trespass or trover will lie (h). And where a

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but a special property in the box, which cannot prevail against a general property. *Holliday v. Camself*, 1 T. R. 658. The reason why one tenant in common cannot maintain trover against a co-tenant seems to be, that possession by the one is in law the possession of both, 1 Salk. 290. B. N. P. 34, 5. *West v. Pasmore*, B. N. P. 35. And where the possession of a tenant in common becomes tortious, the co-tenant may maintain trover, B. N. P. 35. In *Heath v. Hubbard*, 4 East, 110, the Court intimated an opinion that the mere sale of the whole chattel by a co-tenant in common would not amount to a conversion. But in *Barton v. Williams*, 5 B. & A. 395, great doubt seems to have been entertained upon the question whether a sale of the whole by a mere tenant in common would not amount to a conversion; and Abbott, C. J. and Bayley, C. J. seem to have been of opinion that such a sale would amount to a conversion. Where a sale is made of the whole chattel in market-overt there seems to be no doubt, for then the one tenant in common is as effectually deprived of his property as by the actual destruction of the chattel. When the sale is not in market-overt it seems that the interest of the tenant in common still remains, notwithstanding the sale of the whole by the defendant; but still the act of selling the co-tenant's share may amount to a conversion, although the property be not changed—(1).

Where J. F. advised the plaintiffs that he had remitted to them 1,969 dollars consigned to Laycock, and did consign 4,700 dollars to Laycock, and pledged the bill of lading to the defendant, and the latter received the value of the dollars at the Bank of England, where they had been deposited by Laycock, it was held, that as the defendant had converted all the plaintiff's dollars as well as his own, trover would lie, although there had been no severance of the plaintiff's dollars from the rest. *Jackson v. Anderson*, 4 Taunt. 24. In *Smith v. Burridge*, 4 Taunt. 684, it was held that one of several partners in a government contract could not pledge goods consigned to him by another partner for the purpose of performing the contract.

(g) *Fennings v. Grenville*, 1 Taunt. 241.

(h) *Ibid.* And see 2 Will. Saund. 47, g.; *Cross v. Abbott*, Noy, 14; 4 East, 117. In *Heath v. Hubbard*, 4 East, 110. [*St. John v. Standing*, 2 Johns. 468.]

(1) [In *Cowan v. Buyers*, Cooke's Rep. 53, it was held that if one tenant in common does acts inconsistent with the nature of the co-tenancy, and which in the common course of things will destroy the other's interest in the property, the latter may maintain trover against the former. See also the observations of Chipman, C. J. in *Vickery v. Telf*, 1 Chip. Rep. 242.

The Supreme Court of New York have decided that if one tenant in common of a chattel sell it, an action of trover will lie against him by the other co-tenant. *Wilson & al. v. Reed*, 3 Johns. 174. Tenants in common are not like partners; the latter may dispose of chattels, by virtue of an implied authority to sell, without being liable as for a tort. *ibid.*]

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Conversion.

Presumptive
evidence.

tenant in common of a ship forcibly took it out of the possession of a co-tenant, secreted it, changed its name, and it afterwards came into the hands of one who sent it to sea, where it was lost, it was held to have been properly left to a jury whether this was not a destruction by the means of the defendant (i).

- * 1497 The ordinary presumptive proof of a conversion consists in evidence of a demand of the goods by the plaintiff, and a refusal to deliver them by the defendant who has possession of them (k). A conversion * is it seems a presumption which in point of law a Jury ought to make from such evidence, unexplained by circumstances, but it is a presumption in law and fact, and if the jury simply find the fact of a demand and refusal the Court cannot infer a conversion (l). This proof is always necessary where the goods came lawfully into the defendant's possession, as by finding, or upon a bailment, or delivery of the owner (m) (1); but is unnecessary where a tortious taking of the goods can be proved (n). Previous to the proof of a demand and

(i) *Barnardiston v. Chapman*, 4 East, 121, n. The Jury found in the affirmative.

(k) In the case of *Baldwin v. Cole*, 6 Mod. 212; Holt, 707; Ld. Holt said that "the very denial of goods to him who has a right to demand them is an actual conversion, and not merely evidence of it as has been holden; for what is a conversion but the assuming to one's-self the property and right of disposing of another's goods? and he that takes upon himself to detain another's goods from him without cause takes upon himself the right of disposing of them" [See *Bristol v. Burt*, 7 Johns. 254, and the reporter's notes, 2d edit.] And see Ld. Ellenborough's observation in *McCombie v. Davis*, 6 East, 540; and *Bloram v. Hubbard*, 5 East, 407. This, however, is not quite accurate, for the Court can pronounce no judgment where the Jury merely find a demand and refusal.

(l) *Mires v. Solebay*, 2 Mod. 242; 10 Coke, 57; 2 Roll. Ab. 693: 1 T. R. 478; Hob. 187; 1 Roll. R. 131.

(m) *Bruen v. Roe*, 1 Sid. 264. See *Nixon v. Jenkins*, 2 H. B. 135; *infra*, 1499. [*Brown v. Cook*, 9 Johns. 361. *Quay v. McVinch*, 1 Rep. Con. Ct. 78. *Chandler v. Partin*, *ibid.* 72.]

(n) *Ibid.* [*Metcalfe's case*, Clayt. 113. *Davis v. Fleming*, 1 M'Cord, 213. *Jones v. Dugan*, *ib.* 428.] Where cattle are tortiously taken by way of trespass a conversion shall be intended; other-

(1) [Where the defendant had taken two sheep and their lambs out of the plaintiff's flock, supposing they were his own, proof that he had afterwards promised to return them, and had failed so to do, was held to be evidence of a conversion, without showing a demand and refusal. *Durell v. Mosher*, 8 Johns. 445. And the defendant's admission that he had the plaintiff's goods, and that they were lost, was held to be evidence of a conversion, without proof of demand and refusal. *La Place v. Aupoix*, 1 Johns. Cas. 406.]

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refusal evidence of the possession by the defendant is essential (o) ; and proof of a possession by the servant of the defendant is insufficient, unless it be proved that he was his agent for the purpose, or that the agent was employed, and the goods delivered in the course of trade (p). Thus, a delivery to the servant of a pawnbroker in the shop is evidence of a delivery to a pawnbroker (q).

If the demand was in writing notice should be * given to * 1498
produce it in the usual way (r). Notice left at the dwelling-house is sufficient (s). If an oral as well as a written demand has been made it is sufficient to prove the former (t), although both were made at the same time (u) (1).

Demand.

A demand in writing of "the amount of the goods you have disposed of" is sufficient (x).

As a demand and refusal do not amount to a conversion, and are but evidence of the fact, a Jury may from such evidence presume a conversion, on a day previous to the refusal. Where it appeared from the memorandum that the bill had been filed on the 28th of November, it was held that a conversion previous to the filing the bill might be presumed from a demand and refusal on the 29th of November (y), a previous possession of the deeds in question having been proved.

If, indeed, the defendant, having possession of the plaintiff's goods, absolutely refuse to give them up, and there be no evidence to justify the refusal, or to explain it, then the presumption of conversion is a presumption of law, upon which the Jury ought to find a conversion (z). But a mere

wise where the defendant comes to the possession by finding. Per Holt, C. J. in *Baldwin v. Cole*, 6 Mod. 212 ; *Beckwith v. Elsey*, Clayt. 112, pl. 191.

(o) B. N. P. 44 ; 2 Salk. 441.

(p) 2 Salk. 441.

(q) Ibid.

(r) *Supra*, tit. *Notice*, and Vol. I. p. 359.

(s) *Logan v. Houlditch and another*, 1 Esp. C. 22 ; *supra*, 976 ; *Thompson v. Shirley*, 1 Esp. C. 31.

(t) *Smith v. Young*, 1 Camp. 440.

(u) Ibid.

(x) *Thompson v. Shirley*, 1 Esp. C. 31 ; Clayt. 122, pl. 214. [*La Place v. Aupoix*, 1 Johns. Cas. 406.]

(y) *Wilton v. Girdlestone*, 5 B. & A. 847. And see *Morris v. Pugh*, 3 Burr. 1243.

(z) *Supra*, 1244.

(1) [*Vid. Infra*, 1502, note (2).]

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Demand.

* 1499

qualified refusal, alleging special grounds for not delivering the goods, if it afford any evidence of a conversion to be submitted to a Jury, at all events raises no legal presumption on which the Jury are to find, independently of their actual * conviction of a conversion in fact (z). Thus, a refusal to a party who makes the demand on behalf of a third person, on the ground that the holder of the goods does not know to whom they belong, is not a conversion (a). So, if he state that he is not satisfied with the authority of the person making a demand on behalf of another (b) (1), or refuse to deliver them until the claimant shall have proved his right (c); or having found goods refuse to deliver them because he knows not whether the party demanding them be the true owner (d).

Where a servant on being applied to for goods which were in the possession of the master, qualified his refusal to give them up by referring the plaintiff to his master; it was held that the refusal did not amount to evidence of a conversion by the servant (e).

So, where the servant of an insurance company, to whose warehouse the goods of the plaintiff had been carried after having been saved from fire in the plaintiff's house, said that he could not deliver them up without an order from the Albion office (f). So a false assertion by a carrier

(z) *Solomons v. Dawes*, 1 Esp. C. 83; 2 Bulst. 312. *Green v. Dunn*, 3 Camp. 215, n. vide, tit. *Presumption*.

(a) *Solomons v. Dawes*, 1 Esp. C. 83. And see 2 Bulst. 312; B. N. P. 46. [*Watt v. Potter*, 2 Mason's Rep. 77. *Jacoby & al. v. Laussatt*, 6 Serg. & Rawle, 300.]

(b) *Ibid*.

(c) *Green v. Dunn*, 3 Camp. 215, n.

(d) Per Coke, C. J. 2 Bulst. 312. If the party making the demand had no authority from the owner, the refusal will not be evidence of a conversion. *Gunton v. Nurse*, 2 B. & B. 447.

A demand of fixtures and refusal of fixtures is no evidence of a conversion of goods which are not fixtures. *Colegrave v. Dias Santos*, 2 B. & C. 76.

(e) *Alexander v. Southey*, 5 B. & A. 247. Note; the learned Judge who tried the cause left the case to the Jury on the qualified refusal; but the Court of K. B. intimated an opinion that the plaintiff ought to have been nonsuited.

(f) *Alexander v. Southey*, 5 B. & A. 247.

(1) [It is not necessary that the person making the demand should show his authority or title at the time of the demand—and refusal, if the defendant be apprized of the fact *aliunde*. *Ratchife v. Vance*, 2 Rep. Con. Ct. 241.]

that he has delivered the goods does not amount to a conversion (g).

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Where a trader makes a collusive sale of goods on * the eve of bankruptcy, the assignees in trover against the vendee must prove a previous demand and refusal (h). And where goods have been pawned to secure an advance of money on an usurious contract, the owner cannot recover the goods in trover without tendering the money and legal interest (i), upon the general equitable principle, that he who seeks equitable relief must do equity (k).

Demand.
* 1500

Where a lease is deposited with C. on the joint account of A. and B., one of them alone has not authority to demand it without the assent of the other (l). Where A. sold goods to B. who paid for them, and C. becoming possessed of the place where the goods were deposited, A.'s agent, accompanied by B. demanded them of C., informing him that the goods had been A.'s and had been sold to B., and C. answered that he would not deliver them to any person whatsoever, and afterwards A. repaid the money to B. and brought trover, it was held that A. was entitled to recover (m), for this is in effect a refusal to deliver to either party.

Proof of a refusal by the defendant's general servant or agent, after demand made, is not evidence of a conversion by the defendant without evidence of some direction or authority from him (n), or of a subsequent assent to the agent's act, where it was for the use and benefit of the principal (o).

* Proof of a demand and refusal by an agent acting in the course of his employment, is evidence of a conversion by the principal. Thus, proof of a demand on and a refusal by the servant of a pawnbroker, who answers that he has lost the goods, is evidence of a conversion by the master (q). So, the sheriff is liable for a conversion by his bailiff (r), and so are all who indemnify the sheriff.

* 1501

Conversion by
an agent.

(g) *Attersol v. Briant*, 1 Camp. 409.

(h) *Nixon v. Jenkins*, 2 H. B. 135.

(i) *Fitzroy v. Gwillim*, 1 T. R. 153.

(k) *Ibid.* and *Bosanquett v. Dashwood*, Cas. Temp. Talbot, 38; Vin. Ab. tit. *Usury*, p. 315.

(l) *May & al. v. Harvey*, 13 East, 197.

(m) *Pattison v. Robinson*, 5 M. & S. 105.

(n) *Pothonier v. Dawson*, Holt's C. 384.

(o) *Supra*, 1445; 4 Inst. 317.

(q) *Jones v. Hart*, 2 Salk. 441. [See *Shotwell v. Few*, 7 Johns. 302. *Judah v. Kemp*, 2 Johns. Cas. 211.]

(r) *Supra*, 1354.

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In general an agent or servant who acts under an authority from his principal, which is apparently legal, and for the benefit of his principal, is liable in trover if the latter had in fact no authority (*s*).

Thus, where a bankrupt on absconding, left plate with his wife, who delivered it to a servant to pawn, and the defendant went along with the servant, and received the plate at the door of the pawnbroker's shop, and went in and pawned it in his own name, and gave his own note to re-pay the money, and on receipt of the money took it and delivered it to the wife, it was held to be a conversion by the defendant, although he acted merely as a friend (*t*).

Particular
persons.
Husband
and wife.

If the husband alone sue, he must prove a conversion of the goods of the wife after marriage. If the husband and wife join, they may prove a conversion of the goods (which were the wife's sole property), either before or after marriage (*u*).

In an action against the husband and wife the plaintiff must prove a conversion by the wife before marriage, or a joint conversion, or a conversion by the * wife alone after marriage (*y*), according to the allegations in the declaration. But proof of a conversion by the husband alone will warrant a verdict against himself alone, although it be alleged that they jointly converted the goods to their own use (*z*). A declaration against husband and wife for converting the plaintiff's goods, is supported by proof of any joint act by which the plaintiff was deprived of his property (*a*).

The time of the conversion is immaterial provided it be previous to the commencement of the action (*b*) (1). The place is also immaterial; trover lies in England for a

(*s*) B. N. P. 47; 2 Str. 813.

(*t*) *Parker v. Godin*, B. N. P. 47; 2 Str. 813.

(*u*) 2 Saund. 47, a.; *supra*, 685.

(*y*) 2 Saund. 47, a.

(*z*) Yelv. 165; 1 Vent. 12. 24. 33.

(*a*) *Keyworth v. Hill and wife*, 3 B. & A. 385. And therefore such a declaration is good after verdict. Ibid. Cro. Jac. 661; Yelv. 166; B. N. P. 46; 2 Str. 1094; Andr. 245. [2 Vent. 45.]

(*b*) 5 B. & A. 847; 3 Burr. 1243. [*Storm v. Livingston*, 6 Johns. 44.]

(1) [Where evidence is offered of a conversion at different times, if the plaintiff had a right to the possession at either of those times, it is sufficient. *Jones v. Sinclair*, 2 N. Hamp. Rep. 319.]

conversion in Ireland (c). But a foreigner cannot recover in England in respect of the taking of his goods at sea and bringing them hither by a foreigner of a nation at enmity with his own (d).

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In this as in other actions of tort, one or more defendants may be found guilty, and the rest acquitted. The plaintiff cannot recover against all unless he prove a joint conversion by all. Proof that *A.* and *B.* two of the defendants, received the goods, and converted them before their bankruptcy, and that *C.* and *D.* their assignees, took possession of them after the bankruptcy, and refused to deliver them up, is not evidence of a joint conversion by all four (e) (2).

Several
defendants.

* 3dly. Where trover is brought for converting a security, the damages are usually given to the amount of the sum secured. But where trover was brought by the assignees of a bankrupt to recover a policy of insurance from the defendant, to whom it had been assigned after an act of bankruptcy, and it turned out that the policy had been effected on a life not insurable, but that the insurance company had, on a memorial being presented by the defendant, voluntarily paid him half the amount, it was held that the plaintiffs could not recover more than the value of the parchment on which the policy was written (g).

* 1503
Damages.

A. as principal, and *B.* as surety, gave a promissory note to *C.* for rent due from *A.*; *A.* having paid the rent, demanded the note, and *C.* refusing to give it up brought an action of trover, and recovered 40s. damages. The stamp on which the note had been written had been purchased by *C.* It was objected, that *A.* alone could not bring the ac-

(c) *Brown v. Hedges*, 1 Salk. 290; Vin. Ab. Ev. T. b. 119, pl. 6; L. E. 155, pl. 7.

(d) 4 Inst. 154; B. N. P. 44. And (*semble*), proof that the two nations are in amity lies on the plaintiff, B. N. P. 44; *sed. qu.*

(e) *Nicoll v. Glennie*, 1 M. & S. 588. [See *Bates v. Smith*, 2 Nott & M'Cord, 84. *Lockwood v. Bull*, 1 Cowen, 322.]

(g) *Wills v. Wells*, 2 Moore, 247. [S. C. 8 Taunt. 264.]

(2) [Where property is bailed to two, a demand on one alone, and a refusal by him to redeliver, will not subject the other to an action sounding *ex delicto*. The plaintiff therefore cannot, in such case, recover in trover against both. *White v. Demary & al.* 2 N. Hamp. Rep. 546. *Aliter*, if the action be *ex contractu*. *Griswold v. Plumb & al.* 13 Mass. Rep. 298. See *Strong v. Hoyt*, 2 Tyler, 208.]

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Defence.	A part-owner who sues alone is entitled to recover, unless the defendant plead in abatement (<i>i</i>), but he cannot recover more than the value of his own share (<i>k</i>).
Defence, general issue.	4thly. The defendant may, under the general issue, adduce any evidence which shows that the plaintiff had * no property whatsoever in the goods. Thus, if the plaintiff, being administrator, declare on his own possession, the defendant may show that another is the lawful executor (<i>l</i>); or where the plaintiff claims title as purchaser of a ship, that the sale was void for non-compliance with the register-acts (<i>m</i>); or that the plaintiff had before recovered damages in trover for the same goods against the defendant, or another; for the effect of the recovery was to vest the property in the former defendant, the plaintiff having recovered damages in their stead (<i>n</i>); or title in another (<i>o</i>). Thus, where the vendor brings trover against a carrier, the latter may show that the property has vested in the vendee (<i>o</i>); but a carrier cannot in general dispute the title of the party who delivered the goods to him (<i>p</i>). That the goods were sold under a distress for rent, although the sale was irregular and

* 1504

(*h*) K. B. Trin. 59 Geo. III.

(*i*) *Addison v. Overend*, 6 T. R. 766. [*Whealwright v. Depeyster*, 1 Johns. 472.] So trover lies at the suit of one of the joint makers of a promissory note, especially if the other maker be a mere surety, 1 Chitty's R. 501. See 2 Will. Saund. 47. a.

(*k*) *Nelthorpe v. Dorrington*, 2 Lev. 113. *Brown v. Hedges*, 1 Salk. 290; B. N. P. 35; 2 Will. Saund. 47. g.; 1 Will. Saund. 291, g. h.

(*l*) 1 Salk. 285, per Holt, C. J. *Mearnsfield v. Marsh*, 2 Ld. Ray. 824; B. N. P. 48. *Secus*, where the defendant declares on a possession by the intestate. *Ibid*.

(*m*) *Supra*, 1150.

(*n*) *Adams v. Broughton*, 2 Str. 1078. [Andr. 19. S. C.] In *Kitchen v. Campbell*, 3 Wils. 308, a recovery in trover was admitted in evidence in answer to an action for money had and received. So, a former recovery in trespass is evidence in an action of trover for the same taking, 2 Bl. R. 831; Com. Dig. Action, K. 3. *Vide supra*, 1281. [See *Yelv.* 68, note (1). *Campbell v. Phelps*, 1 Pick. 65.]

(*o*) *Dawes v. Peck*, 8 T. R. 330; *supra*, 1487.

(*p*) Per Gould, J. and per Ld. Kenyon, in *Laclouch v. Towle*, 3 Esp. C. 114.

(1) [*Kennedy v. Strong*, 14 Johns. 128. *Schermerhorn v. Van Volkenburgh*, 11 Johns. 529.]

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premature (*q*); that the defendant was a gamekeeper, and took the gun by virtue of the statute (*r*); that he took the goods for toll (*s*) (2); or title in himself * as part-owner of the property jointly with the plaintiff (*t*); and this will throw it on the plaintiff to prove a destruction of the joint property, or at least such an alienation of it as puts an end to the joint possession (*u*).

Defence.
General issue.
* 1505

So the defendant may show, in answer to evidence of a demand and refusal, that he was entitled to a lien on the goods (1); as an innkeeper for the keep of a horse (*x*), or a lord of a manor who has seized a beast as an estray (*y*). But he cannot insist on this defence if he gave an unqualified refusal without mentioning the lien (*z*); and the plaintiff may reply, by evidence showing that the right of lien was waved by a special agreement as to the time and mode of payment, but not by an agreement merely as to the quantum to be paid (*a*). So he may give any other evidence which explains the refusal. He may show that the goods were stolen or lost (*b*), or taken from his possession under an execution (*c*), or, in general, that at the time of the demand he had parted with the possession by any

(*q*) *Wallace v. King*, 1 H. B. 13.

(*r*) 22 & 23 C. 2. B. N. P. 48.

(*s*) *W. Jones*, 240.

(*t*) *Supra*, 1495; 1 East, 363. 368.

(*u*) *Supra*, 1495, 6.

(*x*) B. N. P. 45; 2 Show. 161. But if *A.* put a horse to pasture with *B.* at so much per week as long as he remains at pasture, and sell him to *C.*, who brings trover against *B.*, the latter cannot, as an innkeeper or tailor, detain for the lien, Cro. Car. 271; B. N. P. 45.

(*y*) 2 Ro. Ab. 92; B. N. P. 45.

(*z*) *Boardman v. Sill*, 1 Camp. 410, n.

(*a*) *Chase v. Westmore*, 5 M. & S. 180. [Yelv. 67, note.]

(*b*) 1 Roll. Ab. 6; 2 Ld. Ray. 752; B. N. P. 44, 5. *Ross v. Johnson*, 5 Burr. 2825. [*Lownsdell's case*, Clayt. 104. *Owen v. Letwyn*, 1 Vent. 223. *Supra*, Vol. II. 335.]

(*c*) 1 Com. Dig. tit. *Trover*, (E).

(2) [Or that he had a right of entry for rent-arrear, under which he entered, distrained, and sold. *Kline v. Husted*, 3 Caines' Rep. 275.]

(1) [If goods are taken from a commission merchant, by tort of a third person, the owner, after a demand on such person, has a right to possession, and a lien for the commission merchant's expenses cannot be set up in bar, except by himself, or under his express authority. *Jones v. Sinclair*, 2 N. Hamp. Rep. 319.]

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IV.

* 1506
Defence, general issue.
License.

means, or under any circumstances not amounting to a conversion (*d*), or a license from the plaintiff to do the act complained of (*e*). Thus, if goods be sold * with the acquiescence of the plaintiff himself, under an invalid commission of bankruptcy against the plaintiff, no action is maintainable (*f*).

Where goods were sent to the defendant by the mistake of the plaintiff's agent, and the defendant being ignorant of the plaintiff's interest in the goods, sold part and detained the rest, it was held that he was liable in trover as well for the goods sold as for those which remained in his hands (*g*). So the defendant may show that the property was delivered under the decree of a court of competent jurisdiction (*h*), for such a delivery is not a conversion.

Proof of a demand and refusal within the space of six years, where the previous possession was with the assent of the plaintiff, is sufficient to entitle the plaintiff to recover (*i*).

A re-delivery of the goods is evidence in mitigation of damages, but is no bar to the action (*k*). As if *A.* take the horse of *B.* and ride him, and then deliver him to *B.* (*l*).

So, he may show that the articles were fixtures, which were not the subject of an action of trover (*m*).

* 1507 As the action is founded in tort it is a good defence to show that the subject-matter for which the action was brought was not taken injuriously, but with a view * to the owner's benefit, or to prevent mischief, and without any intention to convert it (*n*). As that he took the plaintiff's boat to go over to his own boat which was on fire, and under the care of the plaintiff, and that as he was passing

(*d*) 1 Com. Dig. tit. *Trover*, (E.)

(*e*) A power of attorney to an agent authorizing him to receive, compound and discharge debts, does not authorize him to negotiate bills received by him, and he is guilty of a conversion in doing so. *Hogg v. Smith*, 1 Taunt. 347.

(*f*) *Clarke v. Clarke*, 6 Esp. C. 61. [2 Ves. 326. acc.]

(*g*) *Featherstonhaugh v. Johnston*, 2 Moore, 181. [8 Taunt. 237. S. C.]

(*h*) *Hossack v. Mason*, 4 Moore, 361.

(*i*) *Wortley Montague v. Ld. Sandwich*, 7 Mod. 99; B. N. P. 47.

(*k*) Vin. Ab. Ev. T. b. 119. pl. 4.

(*l*) B. N. P. 46; Danv. 21.

(*m*) 3 Atk. 13; 1 H. B. 259, n.; 1 Str. 1141; 1 P. W. 94. *Penton v. Robart*, 2 East, 28; B. N. P. 34; Hargr. Co. Litt. 55; 6 East, 604; 8 East, 339. *Heralkenden's case*, 4 Rep. 64. *Vide infra*, tit. *Waste*. *Supra*, 1440.

(*n*) Per Ld. Ellenborough in *Drake v. Shorter*, 4 Esp. C. 165.

over the plaintiff's boat sunk (*o*) ; or that as master of a ship he threw the goods overboard from necessity, to prevent the ship from sinking (*p*).

So the defendant, to limit the damages to the plaintiff's own share, may show that he was a tenant in common with others (*q*). If the action be brought by the rightful executor against an executor *de son tort*, the latter may show, in diminution of damages, that he has paid debts of the deceased, and such payments are to be recouped in damages (*r*) ; but payments, though to the full value, afford, it seems, no bar to the action (*s*).

It is no defence, that the defendant being a servant did the act under authority from his master (*t*), or for his master's benefit (*u*), if the latter had no authority, although the act was apparently legal. So the sheriff is liable in trover for seizing the goods of a bankrupt, although he has levied the money and paid it over before the commission, and although he had no notice of the bankruptcy (*x*).

A judgment in trover for a permanent conversion * changes the property (*y*) ; but it seems to be competent to the plaintiff in that action, to show that the damages were given merely for the temporary conversion, and not as the value of the chattel (*z*). But where the declaration states a conversion by the husband and wife to their own use, as

Defence.

* 1508
Judgment, effect of.

(*o*) Per Ld. Ellenborough in *Drake v. Shorter*, 4 Esp. C. 165.

(*p*) *Bird v. Astcock*, 2 Bulst. 280.

(*q*) 2 Lev. 113 ; 4 East, 121 ; 5 East, 420. [*Wheelwright v. Depeyster*, 1 Johns. 471.]

(*r*) B. N. P. 48. *Whitehall v. Squire*, Carth. 104 ; 4 East, 447. [Yelv. 138, note (3).]

(*s*) 4 East, 441 ; *contra*, B. N. P. 48 ; citing Carth. 104, which does not support the position.

(*t*) *Stephens v. Elwall*, 4 M. & S. 259.

(*u*) *Perkins v. Smith*, 1 Wils. 328. [Sayer, 40. S. C. Yelv. 145, note (1).]

(*x*) *Potter Assignee v. Starkie*, Exr. Mich. Term 1807 ; cited 4 M. & S. 260.

(*y*) B. N. P. 49. So, as it seems, the defendant may show that the plaintiff brought an action against *J. S.* for the same goods, and had execution. Where a demand is of a thing certain, as on a bond, a recovery and execution against one is no bar against the other, but where the demand is for uncertain damages a recovery against one is a bar to a recovery against the other, B. N. P. 49.

(*z*) Gil. L. Ev. 265, 2d edit. and in *Trials per pais*, 224, where it is laid down that if a Jury give but 3*l.* damages for a horse whose real value is 15*l.*, a new action lies for damages for the horse, where evidence may be given that the first action was only for the conversion, and not for the damages for the horse itself.

PART
IV.

the wife cannot acquire any property by the conversion, a mere temporary conversion will be intended (a).

Competency.

As a plaintiff may recover in trover on proof of title without proof of possession, it follows that a recovery in trover for lead dug out of a mine, is not evidence in an action of ejectment to prove the plaintiff's possession of the mine (b). The real owner of the chattel is in general competent to defeat the action by proof of property in himself, for the record will not be evidence for him in any other action (c).

UNLAWFUL ASSEMBLY.

* 1509
Unlawful assembly.

MANY of the observations which have been already made with respect to an indictment for a conspiracy, apply to the evidence on an indictment for an unlawful assembly (d). The evidence consists in proof of an * assembly by the defendants, and of the unlawful manner in which it was conducted, or of the illegal intent with which they met, as charged in the indictment. *

Proof of intent.

An assembly of great numbers of persons which, from its general appearance and accompanying circumstances, is calculated to excite terror, alarm, and consternation, is generally criminal and unlawful (e); and all persons who go there for purposes of that kind, and disregarding its probable effect, and the alarm and consternation which are likely to ensue, and all who give countenance and support to it, are criminal parties (e). And hence, evidence is admissible on the one hand to show that great alarm and apprehension has been excited by the meeting, and of the information given to the civil authorities, and of the measures taken in consequence (f).

The proximate evidence to prove the intent consists in proof of the acts and conduct of the parties, when met, their resolutions, speeches, and declarations on that occa-

(a) *Keyworth v. Hill and wife*, 3 B. & A. 685.

(b) B. N. P. 33. *Ld. Cullen's case at bar*, K. B.

(c) *Nix v. Cutting*, 4 Taunt. 18; *Ward v. Wilkinson*, 4 B. & A. 410. *Joseph v. Adkins*, 2 Starkie's C. 76; *Thomas v. Pearce*, *supra*, 1358.

(d) *Supra*, 400. [See *Pennsylvania v. Cries & al.* Addison's Rep. 277.]

(e) Per Bayley, J. in *R. v. Hunt and others*, York Spring Ass. 1820; and per Holroyd, J. in *Redford v. Birley*, Lancaster Spring Assizes, 1822. 3 Starkie's C. 76.

(e) Per Holroyd, J. *Ibid.*

(f) Per Holroyd, J. in *Redford v. Birley*, 3 Starkie's C. 76.

sion; and of the banners, devices, and inscriptions then exhibited. It has been held that parol evidence of such inscriptions and devices displayed on banners at the meeting is admissible, without producing the banners themselves (*g*).

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Proof of intent.

In the next place evidence is also admissible of acts done, resolutions carried, and declarations made in furtherance of the illegal purpose, although at other times and in other places, provided they be connected by proximity of time and place, identity of persons, or other evidence with the meeting in question, and tend to illustrate and explain its meaning and object.

* Thus, the declarations and demeanor of those who were on their way to attend the meeting is evidence to show their object (*h*). So where the question was with what intention a great number of persons assembled to drill, it was held that not only declarations made by those assembled and in the act of drilling, but also declarations made by others who were proceeding to the place, and solicitations to others to accompany them, declaring their object, were also admissible for that purpose (*i*). * 1510

And where it was proved that large bodies of men had come to the meeting from a distance, marching in regular military order, in order to show the nature and character of the meeting, evidence was admitted that within two days of the meeting considerable numbers were seen drilling and training before day-break, at a place from which one of these bodies had come to the meeting, and that on their discovering the persons who saw them they ill-treated them, and forced one of them to take an oath never to be a king's man again (*k*). As also, that on passing the house of the person so ill-treated, in their way to the meeting, they expressed their disapprobation of his conduct by hissing (*l*).

So, upon the trial of *A. B.* and others for an unlawful meeting for the purpose of exciting sedition, it was held that resolutions passed at a former meeting where *A. B.* had presided a short time before at a distant place, were admissible to show the intention of *A. B.* in assembling

(*g*) *R. v. Hunt*, 3 B. & A. 566.

(*h*) *Redford v. Birley*, Cor. Holroyd, J. Lancaster Spring Assizes, 1822. 3 Starkie's C. 76.

(*i*) *Ibid.* See also *Burdett*, bart. v. *Colman*, 14 East, 183.

(*k*) *R. v. Hunt and others*, 3 B. & A. 566.

(*l*) *Ibid.* *Redford v. Birley*, Cor. Holroyd, J. Lancaster Spring Assizes, 1822. 3 Starkie's C. 76.

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and attending the meeting in *question (m); and for this purpose it was held also that a copy of the resolutions delivered by *A. B.* to the witness at the time of the former meeting, as the resolutions then intended to be proposed, and which corresponded with those which the witness then heard read from a written paper, were evidence without producing the original (n).

USE AND OCCUPATION.

St. 11 G. 2.
c. 19, s. 14.

AN action for use and occupation is either in debt or assumpsit. Debt lies for use and occupation generally at common law, without setting forth the particulars of the demise (o), or the place where the premises lie (p), and the action is not local (q). The action of *assumpsit* for use and occupation depends on the stat. 11 Geo. II. c. 19, s. 14 (1), which enacts that where the agreement is not by deed the landlord (r) may recover a reasonable satisfaction for the lands occupied by the defendant, in an action on the case, for the use and occupation of what was so held and enjoyed; and that if it shall appear that there was

(m) *R. v. Hunt and others*, 3 B. & A. 566.

(n) *Ibid.*

(o) *Wilkins v. Wingate*, 6 T. R. 62. *Davies v. Edwards*, 3 M. & S. 380. It was held that an action of assumpsit was not maintainable at common law to recover rent reserved on a parol demise, Roll. Ab. (O.) pl. 1. *Brett v. Read*, Cro. Car. 343. Although it was maintainable on a promise to pay a sum of money for the use of the premises. *Johnson v. May*, 3 Lev. 150. *Darinal v. Morgan*, Cro. Jac. 598.

(p) *King v. Fraser*, 6 East, 348.

(q) *Egler v. Marsden*, 5 Taunt. 25. [*Henwood v. Cheeseman*, 3 Serg. & Rawle, 502.]

(r) Debt for use and occupation may be maintained by a corporation aggregate. *Dean and Chapter of Rochester v. Pierce*, 1 Camp. 466; 3 P. W. 423. And *semble*, assumpsit would also lie. See 1 Roll. R. 82; 2 Lev. 174; 1 Vent. 298; 16 East, 6.

(1) [Assumpsit for use and occupation of land, by permission and assent of the plaintiff, on an *express* promise to pay a *certain sum*, or in general, to pay to the plaintiff's *satisfaction* for such use, &c. lies at common law, independently of stat. 11 Geo. II. c. 19. *Eppes's Ex'ors v. Cole & ux.*, 4 Hen. & Mun. 161. It also lies on an *implied* promise. *Sutton v. Mandeville*, 1 Munf. 407. *Gunn v. Scovil*, 4 Day, 299. *Jacks v. Smith*, 1 Bay, 315. *Smith v. Sheriff*, 1 Bay, 443. *Hayes v. Acre*, Cam. & Nor. 19. *Sed vide Codman & al. v. Jenkins*, 14 Mass. Rep. 95. 97.]

* a parol demise, or an agreement not being by deed (s), wherever a certain rent was reserved, the plaintiff shall not therefore be nonsuited, but shall make use thereof as evidence of the quantum of the damages to be recovered.

Proof of
occupation.

The plaintiff must prove 1st. An occupation by the defendant; 2dly. That it was by permission of the plaintiff; 3dly. The value. First, The occupation of the premises.—Proof of an *actual occupation* is not essential. Where a house and premises are demised by a written agreement, rent is recoverable which has accrued after the house has been burnt down, and the defendant has ceased to occupy the premises (t). And rent is recoverable in this action after an actual desertion of the premises by the defendant, provided the contract still remain in force (u). But where a landlord accepted the key in the middle of a quarter under a parol agreement that all rent should cease, and occupied the premises himself from that time, it was held that he could not afterwards recover for use and occupation subsequent to the time of accepting the key (x).

An occupation by a lessee is an occupation by the lessor. Hence, if A. let premises to B. and B. let them to C. who occupies them, this is an occupation by B. (y); but a sub-lessee is not liable in respect of an antecedent occupation by the mesne lessor (z). Where, therefore, the assignees of a bankrupt take possession in the middle of a year they are not liable in respect * of the previous * 1513 occupation by the bankrupt (a); nor is the bankrupt liable in this action in respect of the occupation and possession by his assignees.

Where a woman before her marriage held as tenant from year to year, the rent being payable half-yearly, it was held that an action was not maintainable against the

(s) But the plaintiff may recover notwithstanding an agreement by deed, provided it contain no words of present demise. *Elliott v. Rogers*, 4 Esp. C. 59; *Banister v. Usborn*, Peake's L. E. 254. [395, Norris's ed.]

(t) *Baker v. Holtzaffell*, 4 Taunt. 45.

(u) *Vide supra*, 591.

(x) *Whitehead v. Clifford*, 5 Taunt. 518.

(y) *Bull v. Sibbs*, 8 T. R. 327.

(z) *Naish v. Tatlock*, 2 H. B. 319.

(a) *Naish v. Tatlock*, 1 H. B. 319. But the bankrupt would be liable for the whole under his agreement or covenant to pay rent, although the assignees had occupied during part of the time, for the contract is not discharged by the certificate. *Boot v. Wilson*, 8 East. 311. And now see the stat. 49 G. III. c. 121, s. 6; *supra*, 209; 4 T. R. 94.

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IV.Proof of
occupation.

husband alone in respect of rent which had accrued at the end of the half-year, during which the marriage took place (*h*), for he was not the occupier in the interval between the commencement of the half-year and the marriage; and the action is given in respect of the occupation, and the remedy is not co-extensive with the action of debt for rent.

Although the situation of the premises need not be stated, a variance in the description would be fatal (*c*): As in the name of the parish where the premises are described to be situate.

Plaintiff's
permission.

* 1514

2dly. The statute contemplates the relation of landlord and tenant, and therefore it seems that a stranger * cannot try his title in this form of action (*d*). The plaintiff must therefore prove an *occupation* by his *permission* of the premises by the defendant (*1*). This may be proved directly

(*b*) *Richardson v. Hall*, 3 Moore, 207; 1 B. & B. 52. *A.* having contracted for the lease of a house permits a mistress to occupy it. It is afterwards agreed that she shall take up bills which he has accepted in part payment of the purchase-money, and that the lease shall be assigned to her; she remains in possession, and does not take up the bills, and marries the defendant, who occupies the house. *A.* cannot, without any communication on the subject of rent, maintain an action for use and occupation against the husband. *Keating v. Bulkely*, 2 Starkie's C. 419.

(*c*) *Wilson v. Clark*, 1 Esp. C. 273. *King v. Frazer*, 6 East, 348; *Pool v. Court*, 4 Taunt. 700; 13 East, 9. *Guest v. Caumont*, 3 Camp. 235. [See 1 Taunt. 570. 4 ib. 671.] But in *Kirtland v. Pounsett* it was held to be sufficient to prove the parish in which the premises were alleged to be situate, by the name by which it was generally known. 2 Taunt. 145.

(*d*) *Morgan v. Ambrose*, Cor. Wilm. J. Monmouth Sum. Ass. 1756; Peake's Ev. 255, 5th edit. And see Lord Mansfield's observations in *Powell v. Milbanke*, 1 T. R. 401. n. [*Codman & al. v. Jenkins*, 14 Mass. Rep. 95. *Pott v. Lesher*, 1 Yeates, 576.]

(1) [In *Cummings & uz. v. Noyes*, 10 Mass. Rep. 433, where a demandant in a real action had recovered judgment for possession, which he took under a *habere facias*, and the judgment was afterwards reversed and he was turned out of possession by another writ that issued upon the judgment of reversal—it was held that he was liable to the original tenant in an action of assumpsit for issues and profits received between the time of the first judgment and reversal. But in *Wyman & al. v. Hook*, 2 Greenleaf, 337, it was decided that assumpsit will not lie against a judgment debtor for the use and occupation of land set off on execution against him, where he contests the regularity of the proceedings—unless an express contract be proved. And in *Vandenheuvel v. Storrs*, 3 Conn. Rep. 303, where the defendant entered under a contract for the purchase of land, and occupied it several years, and then abandoned it to the plaintiff without performing his contract; it was held that assump-

by the production and proof of a written agreement (e) if any has been entered into, in the usual way, by the evidence of the attesting witness, if there was one, or if not, by proof of the signature of the defendant. An agreement is evidence although it contain no terms of present demise (f). If the instrument be merely a prospective agreement for a lease, it must be stamped as an agreement; and if the agreement contain words of present demise it must be stamped as a lease (g). If there be no written *agreement- * 1515

PART
IV.

Plaintiff's
permission.

(e) *Supra*, 81, (c.)

(f) *Elliott v. Rogers*, 4 Esp. C. 59.

(g) If the instrument be so far prospective in its operation as to express the intention of the parties as to the terms of a future lease, it is an agreement only, although it contain a contract for present possession, unless it also provide as to the terms of such possession in the interval, or contain actual words of present demise, for then it evidently operates as an agreement in respect of the future lease, but as a lease *quousque*. Thus, an agreement to demise and let copyhold premises to C. on the death of B. with a covenant to procure a license from the lord to let the premises, operates as an agreement only, and not as an absolute demise. *Doe d. Coore v. Clare*, 2 T. R. 739. So where the instrument set forth the conditions of a future lease of lands and rent, and of the times of entry, and it was agreed that a lease should be executed on those conditions with the usual covenants. *Tempest v. Rowling*, 13 East, 18. So, where the terms were that the lessee should take possession immediately, and that a lease should be executed in future. *Goodtitle d. Estwick v. Way*, 1 T. R. 735. Where A. agreed to let her house to B. during her life, supposing it to be occupied by B. or by a tenant agreeable to A.; and it was provided that a clause was to be added in the lease to give A.'s son an option to possess the house when of age; it was held that the latter clause showed that it was merely an agreement for a lease. *Doe d. Broomfield v. Smith*, 6 East, 530. Otherwise where the contract is for present possession with a provision as to the terms *quousque*. As, where the landlord agreed to let, and upon demand, to execute, to the tenant a lease of a farm, and the tenant agreed to take, and upon demand to execute, a counterpart of the lease of the said farm, on a day specified, containing the usual covenants, &c., and the agreement was to bind until the lease was made, it was held that the contract amounted to a lease, and that the provision as to a future lease was but for better security. *Doe d. Walker v. Groves*, 15 East, 244. So, where one agreed to let, and the other to take, land for 61 years at a certain rent, for building, and the tenant agreed to lay out 2,000*l.* within four years in building five or more houses, and when five or more houses were covered in the landlord agreed to grant a lease or leases, &c. but this agreement was to be considered as binding till one fully prepared could be produced; it was held to operate as a lease. *Poole v. Bentley*, 12 East, 168. See *Sturgeon v. Painter*,

sit for use and occupation could not be maintained, though the defendant was the sole cause why the contract was not carried into effect.]

PART
IV.Plaintiff's
permission.

ment, oral evidence of the terms is admissible; but if it appear that there is a written agreement between the parties on the subject, oral evidence is inadmissible; and if the agreement be not produced, or cannot be read in evidence for want of a stamp, the plaintiff will be nonsuited (*h*).

If there be no direct proof of the occupation by the plaintiff's permission, the plaintiff may resort to presumptive evidence of the fact. As, by proof of the * payment of former rent by the defendant in respect of the same premises; and for this purpose notice should be given to the defendant to produce his receipts for such former rent, if any have been given; or the plaintiff may show that the defendant, on a distress being made for former rent, paid the demand, and for this purpose the notice of distress should be proved, and notice given to the defendant to produce it as well as the receipt (*i*).

Proof that the defendant, on an ejectment being brought without previous notice to quit, produced in his defence a letter from the plaintiff, treating him as tenant, and claiming rent, is conclusive evidence of the tenancy (*k*).

So the permission to occupy may be an inference of law founded on the legal title (1). Thus, the grantee of an annuity, after recovering in ejectment against a tenant in possession under a demise from year to year, may maintain an action for use and occupation against him, in respect

Noy, 128. So, where the instrument contains actual words of present demise, as, "be it remembered, that *J. B.* hath let, and by these presents doth demise, &c." although the instrument contained a further covenant for a future lease, 5 T. R. 165. And see *Fenny d. Eastham v. Child*, 2 M. & S. 255. And words in an agreement that *A. shall hold and enjoy*, &c. if not accompanied by restraining words, operate as words of present demise. Otherwise, if the intention of the parties to execute a future lease can be collected from the subsequent words. *Roe d. Jackson v. Ashburner*, 5 T. R. 163. Where the terms are doubtful the effect must depend upon the intention of the parties, as collected from the whole instrument. *Ibid.* And see *Morgan d. Dowding v. Bissell*, 3 Taunt. 65. *Dunk v. Hunter*, 5 B. & A. 322.

(*h*) *Brewer v. Palmer*, 3 Esp. C. 213; *Hodges v. Drakeford*, 1 N. R. 270; *R. v. St. Paul, Bedford*, 6 T. R. 452.

(*i*) *Panton v. Jones*, 3 Camp. 372. [See *Osgood v. Dewey*, 13 Johns. 240.]

(*k*) *Townsend v. Davis*, Forrest, 120.

(1) [Assumpsit for use and occupation will not lie against a *bona fide* purchaser for a valuable consideration from the heirs of a disseizor, after a descent cast, and without notice of the disseizin. *Wharton & al. v. Fitzgerald*, 3 Dallas, 503—See *Emerson v. Thompson & al.*, 2 Pick. 473.]

of all the rent in his hands at the time of notice to pay the rent to the grantee, and which has accrued from that time down to the time of the demise in the ejectment (l). So trustees may, without attornment, recover in this form of action from a tenant who has had notice from the *cestuy que* trust to pay the rent to him before he paid it over to his original landlord, although the tenant had no notice that the legal title was in the plaintiffs (m). If a landlord let the premises and mortgage them in fee, the mortgagee is entitled, after notice, to * recover the rent which has accrued since the mortgage; and if he afterwards convey to A. to whom the landlord has previously conveyed the equity of redemption, A. can afterwards recover that part only of the rent which became due after his legal estate accrued (n). Where a trespasser has occupied the lands, the plaintiff may waive the tort, and recover in this action upon an implied contract (1).

Plaintiff's
permission.

* 1517
Proof of per-
mission, &c.

Where A. having agreed to sell premises to B., the latter resold to C., who entered into possession, and A. after refusing to perform his contract, got possession from B. by availing himself of a misrepresentation that B.'s suit to enforce the contract had failed, but afterwards conveyed according to the contract; it was held that C. might recover from A. for use and occupation of the premises (o).

Where the defendant has taken possession under a contract of sale, which cannot be completed through a defect in the plaintiff's title, the latter cannot, it seems, recover as on an implied contract for use and occupation (p).

A surviving owner cannot recover for the use and occupation of premises upon his own permission and sufferance,

(l) *Birch v. Wright*, 1 T. R. 378. But he cannot recover for subsequent rent, for the defendant cannot be both a tenant and a trespasser. [See *Hildreth v. Thompson*, 16 Mass. Rep. 191. *Allen v. Thayer*, 17 Mass. Rep. 299.]

(m) *Lumley v. Hodgson*, 16 East, 99.

(n) *Cobb v. Carpenter*, 2 Camp. 13, n.; *Lumley v. Hodgson*, 16 East, 99.

(o) *Hull v. Vaughan*, 6 Price, 157. [See *Smith v. Stewart*, 6 Johns. 46.]

(p) *Kirtland v. Pounsett*, 2 Taunt. 145. Unless, as has been said, the occupation has been beneficial. *Hearn v. Tomlin*, Peake's C. 192. *Hall v. Vaughan*, 6 Price, 169; *infra*, 1519, note (g). [See *Sugden's Vendors*, &c. 183. *Bancroft v. Wardwell*, 13 Johns. 489.]

(1) [Sed vide *Ryan v. Marsh*, 2 Nott & M'Cord, 156. *Henwood v. Cheeseman*, 3 Serg. & Rawle, 500.]

- PART IV.** where they were demised jointly by himself and another owner since deceased (*q*).
- Proof of value.** 3dly. In the absence of an express agreement the plaintiff must prove the value of the premises occupied.
- Defence.** It is a general rule that a tenant shall not be allowed * 1518 * to dispute his landlord's title (*r*) (1). Thus, in an action for the use and occupation of glebe lands, the defendant having paid rent to the plaintiff cannot go into evidence to show that the presentation of the plaintiff to the living was simoniacal (*s*), or that he had no title to the premises (*t*). So it is no defence to show that the plaintiff was mere tenant at will (*u*), or that the plaintiff had previously demised the premises to a third person whose interest has not expired (*x*). Still the defendant may show that the plaintiff's interest was but temporary and that it has since expired (*y*); as, that he has, since the demise, mortgaged the premises to another who has given the defendant notice to pay his rent to him (*z*).
- Value.**
- Defence, determination of tenancy.** So the defendant may prove that the tenancy has been determined, and that subsequently to the determination
- (*q*) *Israel and others v. Simmons*, 2 Starkie's C. 356. *Richards v. Heather*, 1 B. & A. 29.
- (*r*) *Sayer*, 13. 1 Wils. 314. *Morgan v. Ambrose*, Cor. Wilmot, J. Monmouth, 1756; Peake's L. E. 242. [395, 399, Norris's ed.]
- (*s*) *Cooke v. Loxley*, 5 T. R. 4. So, where an occupier of lands has entered into an agreement for a composition for tithes, he cannot, in defence of an action on the agreement, show that the presentation was simoniacal. *Brooksbey v. Watts*, 6 Taunt. 333; 2 Marsh. 38. S. C.
- (*t*) *Morgan v. Ambrose*, Peake's L. E. 242. [395, 399, Norris's ed.]
- (*u*) *Atkinson v. Pierpoint*, Cor. Denison, J. Esp. Dig. 30.
- (*x*) *Phipps v. Sculthorpe*, 1 B. & A. 50. The premises had been let by *A.* to *B.*, and pending the term, *C.* agreed with *A.* to stand in *B.*'s place, and offered to pay rent, and it was held, that in an action brought by *A.* against *C.* for use and occupation, the latter could not insist that the title of *B.* had not been determined by a notice to quit, or a note in writing.
- (*y*) *Morgan v. Ambrose*, Peake's L. E. 242. *England d. Syburn v. Slade*, 4 T. R. 682.
- (*z*) *Holmes v. Pontin*, Peake's C. 99. In the case of *Balls v. Westwood*, 2 Camp. 11, Ld. Ellenborough held that it was no defence to show that the plaintiff's title had expired, without further proving that the defendant had disclaimed to hold under the plaintiff, and had re-entered under a new landlord.

(1) [In *Tschudy v. The State*, 3 Har. & M'Hen. 1, in an action for use and occupation of a house, the defendant was held not to be estopped from gainsaying the plaintiff's title.]

* he has ceased to occupy the premises. As, that the tenancy has been determined by a regular notice to quit (a), or by mere lapse of time according to the terms of the original agreement, or that the term has been duly surrendered (b), or that he has actually delivered up the premises to the plaintiff, who has taken possession under an agreement to put an end to the tenancy (c).

But it is no defence to show that the defendant has abandoned the actual possession, if the tenancy still remain undetermined (d). Thus, if a tenant from year to year neglect to give notice that he will quit, he will be liable to an action for use and occupation after the end of the year, although he actually quitted at the end of the year (e), and although the plaintiff, upon the abandonment of the premises by the defendant, advertised them to be let by putting up a bill in the window (f).

So the defendant may show in defence that his occupation of the premises originated in fraud or misrepresentation, and that he has in fact derived no benefit from such occupation; as, that he entered in the capacity of vendee, and gave up the possession, discovering that the vendor had no title (g).

(a) *Vide supra*, 524.

(b) *Vide supra*, 591.

(c) *Whitehead v. Clifford*, 5 Taunt. 518. A tenant continues to be liable until he can show a determination of the tenancy. *Harland v. Bromley*, 1 Starkie's C. 455; *Harding v. Crethorne*, 1 Esp. C. 57. *Supra*, 591.

(d) *Supra*, 590.

(e) *Redpath v. Roberts*, 3 Esp. C. 225.

(f) *Ibid*.

(g) *Hearn v. Tomlin*, Peake's C. 192, Cor. Ld. Kenyon. In that case the plaintiff representing that he had a longer term than he really had, agreed with the defendant to assign it to him, and the defendant took possession, and the occupation was rather injurious than beneficial to him; and Ld. Kenyon held that the vendor could not, on the vendee's rescinding the contract and giving up the premises, maintain this action to recover for the time during which he was in possession. In the case of *Kirtland v. Pounsett*, 2 Taunt. 145, the Court seem to be of opinion that the vendor could, in no case where the purchase went off for defect of title, maintain this action. The case was not however ultimately decided upon that ground, but on the consideration that the plaintiff had derived a sufficient compensation for the occupation from the interest of the defendant's money. In the subsequent case of *Hall v. Vaughan*, 6 Price, 169, the Court of Exchequer held that where the contract had failed without any fault on the part of the vendor, and the occupation had been beneficial to the purchaser, the vendor might

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consists in the simple excess, and the *quantum* of that excess being immaterial, a variance from it in evidence will not be material (r).

Contract.
Variance.

* 1523

If the declaration state an absolute agreement, and * the proof be of an agreement in the alternative to forbear to the one or other of two days, at the option of the borrower, the variance will be fatal (s).

It is sufficient to prove the loan or forbearance according to its substance and legal effect.

A forbearance by C. to A. is proved by evidence that A. is debtor to B., and B. to C., and of an agreement for an usurious consideration to be paid to C. that he shall take A. as his debtor (t), although B. join A. in the security to C. (u). So it would be by evidence of a loan by C. to B., and the giving a note as security by A. to C., more than legal interest having been taken for forbearance on the note (x).

An allegation of a loan of a specific sum of money is satisfied by evidence of a loan to that amount, part in money, and part in uncoined gold of a certain definite value, which the borrower agreed to take as cash (y).

On a count for usury in discounting two bills of exchange, one of which is described to have been drawn by B. on a certain person, to wit, John K., evidence of a bill drawn on Abraham K., is a fatal variance (z).

Usurious interest.

The offence is completed in the county where the usurious interest is received, and the offence should be laid there (a).

Where usurious interest has been taken by means of an * 1524 agent, it is not essential to call the agent himself; * such a rule, it has been observed, would be very inconvenient (b).

In an action for penalties for having deducted more than legal interest in discounting a bill of exchange, in order to prove the actual receipt of the amount of the bill, it was proved that a demand had been made on the acceptor by a person of the name of Brown, and that proceedings had

(r) *R. v. Gilham*, 6 T. R. 265.

(s) *Tate v. Wellings*, 3 T. R. 531.

(t) *Wade v. Wilson*, 1 East, 195.

(u) *Ibid.*

(x) *Manners v. Postan*, 3 B. & P. 343.

(y) *Barbe v. Parker*, 1 H. B. 283.

(z) *Hutchinson v. Piper*, 4 Taunt. 810.

(a) *Supra*, 1126.

(b) *Per Chambre*, J. 1 N. R. 103.

been instituted by him to compel payment, in consequence whereof, a person on behalf of the acceptor paid to *Brown* the amount of the bill and the costs of suit, on his producing the bill, for which *Brown* gave his receipt as the agent for *Barrow*, the present defendant; and it was held that this was sufficient evidence of the fact to go to a jury, although the proceedings were not produced, and although it was not proved that *Brown* was in fact the attorney for the defendant (c).

Whether the sum taken under the name of commission be a reasonable remuneration for trouble, or be but a cloak for usury, is a question of fact for the determination of the Jury (d). And where there is conflicting evidence upon the subject, the Court will not grant a new trial unless it be manifest that the Jury have decided erroneously (e).

A fresh contract made by parties privy to an usurious agreement, and in furtherance of it, is void. But a *fresh contract made between the same parties in repudiation of the original usury, or with an innocent party who was not privy to the usury, is binding; thus, a fresh security given for the balance of a debt originally usurious is void (f). But where usurious securities have been destroyed by mutual consent, a promise by the borrower to pay the principal and legal interest is binding (g). If *A.* for an usurious consideration give his promissory note to *B.* who transfers it to *C.* for value, without notice of the usury, and afterwards *A.* gives a bond to *C.* for the amount, the bond is valid (h). But it would be otherwise if *A.* gave the bond to *B.* (i).

A *bona fide* debt is not extinguished by being mingled with an usurious transaction (k).

(c) *Owen v. Barrow*, 1 N. R. 101. *Sed qu.* The circumstance upon which the Court appear to have principally relied was the possession of the bill itself by *Brown*.—Where usury is committed by the wife, who lends money secured by bond to her husband, the bond is void, for the husband is liable, *civiliter*, though not *criminaliter*, for the act of the wife. *Barnett v. Tompkins*, Skinn. 348.

(d) *Carstairs v. Stein*, 4 M. & S. 192. See also *Doe d. Grimes v. Gooch*, 3 B. & A. 664.

(e) *Ibid.*

(f) *Pickering v. Banks*, Forrest, 72; *Cuthbert v. Haley*, 8 T. R. 390.

(g) *Barnes v. Hedley*, 2 Taunt. 184. See also *Wright v. Wheeler*, 1 Camp. 165. n.

(h) *Cuthbert v. Haley*, 8 T. R. 390.

(i) *Ibid.*

(k) *Gray v. Fowler*, 1 H. B. 462. If a bond be given without

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legations, which are essential to the claim or charge, with the proofs, is all that is material.

Thus, if it were alleged that *A.* being armed with a bludgeon, and disguised with a visor, feloniously stole, took and carried away the watch of *B.*, the allegations that *A.* was armed and disguised, being entirely *aliene* from the legal essence of the charge, would be wholly rejected, and would require no proof on the trial (*m*).

Partial proof.

The same principle extends much further ; it frequently happens that the evidence fails to prove circumstances not altogether impertinent, but which merely affect the *magnitude* or *extent* of the claim or charge ; and here, although circumstances are alleged, which, if proved, would have been of legal importance, yet, although the evidence fail to establish the whole of what is alleged, the principle adverted to still operates to give effect to what is proved, to the *extent* to which it is proved. The principles which require the cause of action, or ground of offence to be stated, are satisfied. The adversary is not taken by surprise, for no fact is admitted in evidence which is not alleged against him, and the Court is enabled to pronounce on the legal effect of the part which is established as true by the verdict of the Jury, and the record shows the real nature and extent of the right or liability established.

- * 1529 * Thus if *A.* be charged with feloniously killing *B.* of malice prepense, and all but the fact of malice prepense be proved, *A.* may clearly be convicted of manslaughter, for the indictment contains all the allegations essential to that charge ; *A.* is fully apprised of the nature of it, the verdict enables the Court to pronounce the proper judgment, and *A.* may plead his acquittal or conviction in bar of any subsequent indictment founded on the same facts.

The same principle applies to allegations of number, quantity, and magnitude, where the proof, *pro tanto*, supports the claim or charge. If a man be charged with stealing ten sovereigns, he may be convicted of stealing five ; for when it is proved that he stole five, evidence is not admitted of a different offence from that charged, but of the same in legal essence, differing only in quantity, and constituting therefore a *natural* but no *legal* variance ; no evidence is received which is not warranted by the allegations ; and the party may afterwards plead his conviction or acquittal notwithstanding the variance as to number.

But the doctrine as to the sufficiency of partial proof

(*m*) i. e. on an indictment for mere larceny.

assumes that the evidence, as far as it extends, agrees with the allegations legally essential to the charge or claim; that is, that what is proved is part of what is alleged, and differs only in quantity or extent. In other words, where an allegation is rejected *in toto*, it is assumed that the allegations are divisible, and that the averment in question may be so rejected, without destroying the *legal identity* of the charge or claim.

Partial proof.

It is a most general rule, that no allegation which is *descriptive* of the *identity* of that which is legally essential to the claim or charge can ever be rejected. Were it otherwise, and if proof could be admitted which varied from the record, in consequence of the omission to prove any allegation descriptive of an * essential particular, it is plain that the proof would no longer agree with the cause of action, or charge alleged, to *any extent*; they would differ throughout in respect of that descriptive allegation; and as the proof would be more general than the allegations, it would no longer be partial proof of the same charge or claim, but of a different and more general one. As an absolute and *natural* identity of the claim or charge alleged with that proved consists in the agreement between them, in *all* particulars, so their *legal* identity consists in their agreement in all the particulars *legally* essential to support the charge or claim; and the identity of those particulars depends wholly on the proof of the allegations and circumstances by which they are ascertained, limited and described. To reject any allegation *descriptive* of that which is essential to the charge or claim would obviously tend to mislead the adversary. The Court in giving judgment on a general verdict could never be sure that those facts had been proved which were essential to support their judgment; and the record would afford but very uncertain evidence as to the identity, should the same matter be again litigated. For instance, if in an action for breaking the plaintiff's close, he were to describe it as abutting on the several closes *A.*, *B.*, *C.* and *D.*, these would all be allegations descriptive of that which was material, that is, of the subject-matter to which the injury was done, and a variance from any one would be fatal (*n*). For if the allegation, that the *locus in quo* abutted on the close *A.* could be rejected as immaterial, the other abutments might also be disregarded. Evidence would then be admitted of a trespass in an entirely different close; the defendant might come prepared to rebut the charge of trespass, as far as

* 1530

(*n*) *Supra*, 1436, tit. *Trespass*; 2 East, 500.

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Partial proof.

regarded the close * described, but be wholly unprepared to justify an entry into any other close; and the record would afford no evidence, or, what is worse, might mislead in case of future litigation between the same parties. So if a man were to be charged with stealing a *black* horse, the allegation of colour, although unnecessary, yet being descriptive of that which is material, could not be rejected: to admit evidence that he stole a *white* one would not be to prove a *part* of that alleged, but to prove an offence in respect of a subject-matter proved to be different.

The very omission to prove the boundaries in the former case, or the colour in the latter, would be fatal, although different boundaries, or different colour, should not be proved, for neither the trespass nor the larceny proved could be considered to be the same with that alleged, until the allegations descriptive of identity were proved; that is, whilst the proof was general, but the description special; for so long it would be possible that the subject-matter proved was wholly different from that alleged.

It seems, indeed, to be an universal rule, that a plaintiff or prosecutor shall in no case be allowed to transgress those limits which, in point of description, limitation and extent, he has prescribed for himself; he selects his own terms, in order to express the nature and extent of his charge or claim; he cannot, therefore, justly complain that he is limited by them; to allow him to exceed them, would, for the reasons adverted to, be productive of the greatest inconvenience.

As no allegation, therefore, which is *descriptive* of any fact or matter which is *legally essential* to the claim or charge, can be rejected altogether, inasmuch as the variance destroys the *legal identity* of the claim or charge alleged with that which is proved; * upon the same principle, no allegation can be proved partially, in respect of extent or magnitude, where the *precise extent or magnitude* is in its nature descriptive of the charge or claim.

* 1532

If in an action or indictment for a nuisance the wrong be alleged to have been continued for twelve months, and proof be given that it has been continued for one month only, the variance would be immaterial, except so far as regarded the damages or punishment; for the injury or offence would in point of law be the same, whether continued for one month, or for twelve; the only difference would be in point of duration.

But if a contract were to be alleged, to serve for twelve months for the sum of 12*l.*, and proof were to be given of a contract to serve for one month for the sum of 1*l.*, the

variance would be fatal, the precise time, as well as the precise sum, being essential to the contract, and descriptive of the ground of claim. For although a nuisance continued for twelve months be an offence made up of the continuance for each of the several months which make up the twelve, a contract to serve for twelve months, for 12*l.* is not made up of twelve contracts to serve for a month, for 1*l.* each month, but each is separate and distinct in point of law.

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Partial proof.

The same observations apply to prescriptions, and all other cases where precise quantities, sums, duration, or extent, are in point of law essential to the identity of an entire subject-matter, and descriptive of it.

Again, as the description of facts upon the record must necessarily be finite and limited, whilst the detail of those facts in evidence must usually be attended with a multitude of particular circumstances connected with them, it is perfectly clear that whatever minuteness of description may be requisite in stating the claim or * charge upon the record, the evidence to prove those allegations must be still more particular and circumstantial, and consequently that the proof of more particulars than are alleged can never be material, provided such additional particulars consist with those which are alleged. The generality of the allegations may indeed constitute a vice in the record itself, but it never gives rise to the objection of variance from the evidence, unless the subject be of so entire a nature that the matter proved, but not alleged, is inconsistent with that which is alleged, and disproves it altogether.

Redundant
proof.

* 1533

If a man were charged with stealing a horse, the property of *John Doe*, generally, it would be no objection that on the evidence it appeared that there were two persons of that name, the elder and the younger, for if he stole the horse of either, the allegation would be true. But if he were to be charged with stealing the horse of *John Doe*, and it turned out that the horse was the property of *John Doe* and *James Doe*, the variance would be fatal; for the interest of *James Doe*, thus proved, but not alleged, would show that the ownership was mis-described altogether.

The general result of these principles and inferences seems to be, that in the case of *redundant allegations* it is sufficient to prove *part* of what is alleged, according to its *legal effect*, *provided* that that which is alleged, but not proved, be neither *essential* to the charge or claim, nor *describe or limit* that which is essential (*o*): And provided

General
inference.

(o) See the observations of Abbott, C. J. 2 B. & A. 363.

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IV.* 1534
Surplusage.

also, that the facts proved be alone sufficient in law to support the charge or claim. And that *redundancy of proof* will not be material unless that which is proved, but not alleged, *contradict or disprove* that which is alleged.

* In the first place, it seems that the omission to prove circumstances which are alleged, but are not essential to the claim or charge, but are mere surplusage, and might have been wholly omitted, or are merely cumulative, or which operate merely in aggravation, or affect merely the extent of damages, is not material, provided the circumstances so rejected do not operate by way of description of others which are material.

It is a general rule, that whenever an averment may be *wholly rejected* without prejudice to the charge or claim (*p*), proof is unnecessary.

Thus, where a declaration for an injury to the plaintiff's reversionary interest in land alleged that the premises were, at the time of the injury, and *still were*, in the occupation of *A. B.*, whereas the occupation of *A. B.* had ceased previous to the commencement of the action, the variance was held to be immaterial, the possession of *A. B.* as tenant at the time of the injury being properly described (*q*).

Where the plaintiff, in an action for breach of a warranty in selling goods unfit for sale, alleged in his declaration that the defendants *knew* the goods to be unfit for sale, it was held that the allegation of knowledge, being immaterial, need not be proved (*r*).

So where an indictment alleged a robbery to have been committed in the dwelling-house of *A. B.*, it was held that a variance as to the owner's name was immaterial, as it was not essential to the crime of robbery that it should have been committed in a dwelling-

(*p*) See the observations of Lawrence, J in *Williamson v. Allison*, 2 East, 452. The rule is of course otherwise where the averment cannot be wholly rejected without also rejecting something essential to the action.

(*q*) *Fowles v. Miller*, 3 Taunt. 137.

(*r*) *Williamson v. Allison*, 2 East, 452. Allegation (in an action against a sheriff for taking insufficient sureties on a replevin-bond,) that the party replevying levied his plaint at the next county-court, *to wit*, at the county-court holden on, &c. before *A, B, C, &c.* suitors of the court, the evidence was of a plaint levied at a court holden before *E, F, G, &c.* and held to be sufficient; for the allegation, that the court was held before *A, B, C, &c.* was immaterial, and might have been altogether omitted, *Draper v. Garratt*, 2 B. & C. 2. And note, that it was observed by all the Judges that the allegation was under a *scilicet*.

house (s). * So if arson be alleged to have been committed in the night-time (t).

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If an offence at common law be laid to have been committed against the form of the statute, the allegation may be rejected (u). Surplusage.

Where the plaintiff alleged, that before the publication of a libel by the defendant the plaintiff's carriage came in contact with a carriage in which E. S. was riding, and that the accident happened without any default on the part of the plaintiff, and then alleged a publication of a libel of and concerning the accident, and upon the evidence it appeared that the accident did happen through the default of the plaintiff, it was held to be no variance so as to bar the plaintiff from recovering as to part of the libel not justified, the allegations being divisible, and the averment that the accident happened without the plaintiff's default being an immaterial circumstance (x).

So where allegations are merely cumulative. In an action for words it is sufficient to prove so much of the words laid in any one count as are actionable (y). Cumulative allegations.

Where an information for a seditious libel alleged that outrages had been committed in and in the neighbourhood of Nottingham, it was held that the allegation was divisible, and that it was sufficient to prove that outrages had been committed fourteen or fifteen miles from Nottingham (z).

* Where an indictment charges a defendant with composing, printing and publishing a libel, he may be found guilty of the printing and publishing only (a). * 1536
Proof of part.

If an indictment for treason charge several overt acts, it is sufficient to prove one (b).

(s) *Pye's case*, East's P. C. 785; *Johnston's case*, Ibid. 786.

(t) *R. v. Minton*, East's P. C. 1021.

(u) 5 T. R. 162; 4 T. R. 202; 1 Saund. 135, n. 3. [16 Mass. Rep. 385. 3 Yeates, 407. 3 Day, 103. Acc. See 1 Chit. Crim. Law, 276. 289. Yelv. 116, note.]

(x) *Lord Churchill v. Hunt*, 2 B. & A. 685.

(y) *Compagnon v. Martin*, Bl. Rep. 794. *R. v. Drake*, 2 Salk. 660; Dy. 75, a. Hardr. 470. *Supra*, 845. *Flower v. Pedley*, 2 Esp. C. 491. *Secus*, where the words alleged, but not proved at all, qualify those which are proved.

(z) *R. v. Sutton*, 4 M. & S. 532.

(a) *R. v. Williams*, 2 Camp. 507. *R. v. Hunt*, Ib. 583; 2 East's P. C. 515, 6.

(b) *Fost. 194.*

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Proof of part.

On an indictment for feloniously forging and causing to be forged, the prisoner may be convicted of either.

Where a declaration under the Bribery Act alleged that the bribe was to induce *White* to vote for Mr. *Lockyer* and Lord *Egmont*, it was held to be sufficient to prove that the bribe was to give his vote for Mr. *Lockyer* (c).

In an action by the husband for a malicious prosecution of the husband and wife, the plaintiff is entitled to recover in respect of a malicious prosecution of the wife (d).

In an action against the sheriff for suffering the husband and wife to escape upon an execution founded on a debt due from the wife before coverture, the plaintiff is entitled to recover, on proof that the husband alone was taken in execution, and suffered to escape (e).

If a plea allege two matters, either of which amounts to a justification in trespass, it is sufficient to prove one, though the whole be put in issue by the general plea of *de injuria* (f).

* 1537 If the defendant avow for rent and a *nomine pene* together, without alleging any demand of rent, the * avowry is good for the rent, though it be ill for the penalty (h).

Aggravation.

And not only may merely useless and cumulative averments be rejected, but so also may averments which are material by way of *aggravation*, provided they be not essential to support the charge or claim, or describe or limit that which is essential. As in civil cases, where matters are alleged in aggravation of trespass or slander, or other ground of action.

Thus, if in trespass *quare clausum fregit* the plaintiff allege that the defendant is an inferior tradesman or dissolute person, although he fail in the proof, he is still entitled to damages for the trespass (i).

So on indictments for special and aggravated offences, including more general ones, if the prosecutor fail in proving the circumstances in which the aggravation consists, the defendant may still be convicted of the inferior and more simple offence (k).

(c) *Coombe v. Pitt*, 3 Burr. 1586.

(d) *Smith v. Hizon*, 2 Str. 977.

(e) *Roberts & Uz. v. Herbert*, 1 Sid. 5; B. N. P. 299.

(f) *Spilsbury v. Micklethwaite*, 1 Taunt. 147.

(h) 1 Saimd. 286; B. N. P. 56.

(i) *Pallas v. Rolle*, 2 Bl. Rep. 900.

(k) Stark. Crim. Plead. 323, 2d edit. *Macally's case*, 9 Co. 67, b.; Co. Litt. 282, a. But where an indictment alleged that the defendant rescued goods which had been seized by the prosecutors,

Under a count against a sheriff for a voluntary escape, the plaintiff is entitled to recover if he prove a negligent escape (*l*).

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In the case of *Coombe v. Pitt* (*m*), Lord Mansfield said "In penal actions, the material fact must be charged, and a fact must be proved in such a manner that all those consequences will follow the verdict * which ought to attend it. But aggravations, and all circumstances that do not vary the offence, are out of the case as to the necessity of proving them."

* 1538

Omission to
prove the
whole damage.

So in general a variance as to the extent of the damages alleged is immaterial.

If a plaintiff declare on a policy for a total loss he may recover for a partial loss (*n*).

So if a plaintiff prove part of his breach of covenant (*o*), or promise (*p*).

But here, as in all other cases, although the omission to prove that which operates merely by way of aggravation will not be fatal, yet part of that which is alleged, and which is sufficient to support the charge or claim, must be proved.

The plaintiff, in an action of covenant, alleged that the defendant had not treated the farm in a husbandlike manner, but on the contrary thereof had committed waste. The defendant pleaded that he had not committed waste, &c. and issue being taken on this plea, it was held that the plaintiff could not go into evidence to show improper treatment of the farm, short of the commission of waste (*q*).

Here it is to be observed, that as the only breach in issue was the commission of actual waste, a term of known legal import, acts of bad husbandry not amounting to acts

who were bailiffs, under a writ of *feri facias* and warrant, and upon motion in arrest of judgment the indictment was held to be bad, for not setting out the writ, the judgment was arrested, although the Court held that an indictment would have lain for the single battery. *R. v. Westbury*, 8 Mod. 357.

(*l*) *Bonafous v. Walker*, 2 T. R. 126.

(*m*) 3 Burr. 1586.

(*n*) *Gardiner v. Croasdale*, 2 Burr. 904. *Nicholson v. Croft*, 2 Burr. 1188; 1 Bl. Rep. 198. And see *Goram v. Sweeting*, 2 Saund. 205.

(*o*) Burr. 1907; 1 Bl. Rep. 200.

(*p*) 2 Burr. 904.

(*q*) *Harris v. Mantle*, 3 T. R. 307.

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magnitude,
extent.

* 1539

of waste could not constitute *any part* of the breach in issue.

Again, a mere variance as to number, magnitude, or extent, is not material, unless the *quantum* be descriptive of the nature of the claim or charge.

* If a defendant be charged with engrossing 1,000 quarters, he may be convicted on proof of having engrossed 700 quarters (*r*).

If a plaintiff declare in ejectment for a fourth part of an estate, he may recover a third of one fourth part (*s*).

In an action of waste for cutting down trees, it is sufficient to prove that the defendant cut down part of the number alleged (*t*).

Sums, &c.

So in an action to recover double the value of goods fraudulently removed to avoid a distress for rent, the *quantum* of rent alleged to be due is immaterial (*u*).

If a defendant avow for half a year's rent in arrear, he will be entitled to a verdict, though he prove but a quarter's rent in arrear (*x*).

Proof of the tender of a larger sum will support an allegation of the tender of a smaller sum (*y*).

On an indictment for taking illegal brokerage, i. e. more than 10s. in the pound, it is sufficient to prove that the defendant did in fact take more, without proving the precise excess as alleged, although it be alleged without a *videlicet* (*z*).

* 1540

So on an indictment for extortion, alleging that * the defendant extorted 20s. it is sufficient to prove that he extorted 1s. (*a*).

In debt for using a trade without having served an apprenticeship, the whole time laid in the declaration need

(*r*) *Vaux v. Austin*, Lane, 59.

(*s*) 1 Sid. 239; 1 Burr. 330. [See Vol. II. 540, 541.]

(*t*) 2 Roll. Ab. 706; Co. Litt. 282, a; Hob. 53.

(*u*) *Guinnet v. Phillips & others*, 3 T. R. 643.

(*x*) *Harrison v. Barnby*, 5 T. R. 248. *Forty v. Imber*, 6 East, 434; 1 Saund. 285; Moor, 281; 2 Salk. 580; B. N. P. 56. *Secus*, if he has title to two undivided parts of the rent only. *Ibid. Supra*, 1296. But in stating a demise, he cannot narrow the rent. Where the plaintiff declared in debt for rent, stating a lease rendering 15l. per annum, and proved a lease rendering 15l. and three fowls, the variance was held to be fatal. *Sands v. Ledger*, 2 Ld. Raym. 792.

(*y*) *Supra*, 1392.

(*z*) *R. v. Gilham*, 6 T. R. 265.

(*a*) Per Holt, C. J. *R. v. Burdett*, 1 Ld. Raym. 149.

not be proved; it being alleged that the defendant forfeited 40s. for every month (b).

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In an action of debt under the stat. 4 G. II., c. 28, for double the yearly value of land held over (c), or for treble value for not setting out tithes, under the stat. of Ed. VI. (d), a variance in the value is immaterial, the action not being for a precise sum, but for a sum in proportion to the value or damage found by the Jury.

Magnitude.
Sums, &c.

In actions of trespass and replevin, if the defendant succeed in establishing his justification to the smallest extent in point of number or quantity, he will be entitled to a verdict, although a trespass be shown to a much greater extent (e).

The position, that a mere variance in point of extent or magnitude is not material, assumes the *divisibility* of the subject-matter, and does not apply in any case where the precise sum, quantity, or magnitude alleged, is put in issue by the nature of the claim or charge (f).

It is an universal rule, that whatever is wholly surplusage, and might have been struck out on motion, need not be proved (g). And it seems to be clear in * principle, that upon the question, whether a particular averment can be rejected, regard is rather to be had to the nature of the averment itself, and its connexion with the substance of the charge or claim, than to the mere formal manner in which it is averred.

Divisibility of
averments.

* 1541

And it seems to follow, that if averments be in their own nature divisible, supposing them to have been separately averred, they ought still to be so considered, although they be inseparable as far as the mere language of averment is considered, being connected together in one entire phrase or sentence.

The operation of this principle is in effect admitted and established in the most simple instances. If a man be charged with stealing twenty sovereigns, he may be convicted of stealing ten; the allegation is therefore considered to be divisible, although no part of the sentence can

(b) *Powell* q. t. v. *Farmer*, Peake's C. 57.

(c) *Doe v. Jackson*, Dougl. 175. 732, n.

(d) Dougl. 732, n.

(e) *Supra*, 1464. And see *Sloper v. Allen*, 2 Roll. Ab. 706; B. N. P. 299. *Down's case*, 4 Co. 29, b. *Gray's case*, 5 Co. 79. *Brook v. Willett*, 2 H. B. 224. *Rogers v. Allen*, 1 Camp. 313.

(f) *Infra*, 1544. *Grant v. Astle*, Dougl. 731, in not. *In re Gilbert v. Stanislaus*, 3 Price, 54.

(g) See Lord Mansfield's observations, in *Bristow v. Wright*, Dougl. 666: and of the Judges, in *Hoar v. Mill*, 4 M. & S. 470.

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IV.Divisibility of
averments.

be omitted without destroying the whole, and although the ten sovereigns proved to have been stolen are inseparably connected, as far as language is concerned, with the remaining ten.

So in numerous instances, allegations combined in the same sentence have been considered to be divisible and separable, when they are so with reference to the legal essence of a particular charge. Thus a prisoner charged with *burglariously* and feloniously stealing may be convicted of feloniously stealing, should the evidence fail as to the burglary.

A defendant charged with composing and publishing a libel may be found guilty of publishing only.

So a general averment, including several particulars, may be construed *reddendo singula singulis*.

* 1542 An averment that particular lands are in the occupation of *A*, *B*, and *C*, is proved by evidence that the lands are in their several occupations (*h*). And an allegation that lands are situated in the parishes *A*, * and *B*, is satisfied by evidence that part is situate in the parish *A*, and part in the parish *B*. (*i*)

Where a declaration for a false return to a *feri facias* against the goods of *A*. and *B*. alleged, that *A*. and *B*. had goods within the bailiwick, it was held to be sufficient to prove that either of them had, the averment being severable (*k*).

The plaintiff declared for a disturbance of his right of common, alleging that he was possessed of a messuage and land, with the appurtenances, and by reason thereof, ought to have common of pasture; and it was held that the averment was divisible; and that proof that the plaintiff was possessed of land only, and entitled to right of common in respect of that land, was sufficient to entitle him to damages *pro tanto* (*l*).

Descriptive allegations cannot be rejected.

In the next place, it is clear that no averment of any matter essential to the claim or charge can ever be rejected. And this position extends to all allegations which operate by way of *description* or *limitation* of that which is material. Let an averment of this kind be ever so superfluous in its own nature, it can never be considered to be immaterial when it constitutes the *identity* of that which is material (*m*).

(*h*) *Pool v. Court*, 4 Taunt. 700.

(*i*) *Goodtitle d. Brenridge v. Walter*, 4 Taunt. 671.

(*k*) *Jones v. Clayton*, 4 M. & S. 349.

(*l*) *Ricketts v. Salway*, 2 B. & A. 360; *vide infra*, 1550, note (*p*).

(*m*) *Vide supra*, 1529.

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IV.

 Descriptive allegations cannot be rejected.
 * 1543

Thus where the plaintiff, in an action against the sheriff for taking his lessee's goods in execution without leaving a year's rent, alleged that the rent was payable by four quarterly payments, it was held that this allegation, although unnecessary, must be proved (n). * Here the necessary averment that rent was due was limited by the allegation to rent payable quarterly.

The plaintiff, in an action against his lessee for negligently keeping his fire, *per quod* the premises were burnt, alleged, that he was tenant under a demise for seven years, whereas he was but tenant at will (o), and the variance was held to be fatal. Here the injury was to the plaintiff's reversionary interest; the fact of tenancy was essential; and the averment that it was a tenancy under a demise for seven years operated as a limitation and description of that which was material.

Where a common informer, in an action of debt against a sheriff's officer, in his declaration alleged a judgment, and a *fiери facias* upon that judgment, it was held that he was bound to prove the judgment as well as the writ, although it was unnecessary for the plaintiff to have alleged the judgment at all (p).

Here again the allegation of the judgment, which was immaterial, operated by way of description and limitation of the writ, which was material.

So in an action for double rent on the statute (q), where the declaration alleged a lease for three years, and it appeared in evidence that the lease being by parol was void, and that the defendant was but tenant from year to year (r).

* All these cases turned on the plain and simple principle, * 1544 that as the superfluous and unnecessary matter *limited and*

(n) *Bristow v. Wright*, Dougl. 666. Note, that this was a variance in the statement of a contract unnecessarily alleged. See Lord Kenyon's observations in *Gwinnet v. Phillips*, 3 T. R. 645. He there says, "I have heard both in and out of Court, that the doctrine in *Bristow v. Wright* must be confined to contracts." So where a declaration for illegally insuring a lottery-ticket falsely alleged the consideration to be 43l. 2s., although no allegation of consideration is necessary. *Phillips v. Mendez da Costa*, 1 Esp. C. 59. But see the *Earl of Northumberland's case*, B. N. P. 55; Yelv. 148.

(o) *Cudlipp v. Rundle*, Carth. 202; Dougl. 666.

(p) *Savage, q. t. v. Smith*, 2 Bl. Rep. 1101, cited by Lord Mansfield, in *Bristow v. Wright*, Dougl. 666.

(q) 11 Geo. II. c. 19, s. 18.

(r) *Shute v. Hornsey*, K. B. East. 19 Geo. III. cited by Lord Mansfield, Dougl. 666.

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IV.

Descriptive allegations cannot be rejected.

Sums, magnitudes, &c.

described that which was *material*, it thereby became part of that which was material, and could not be rejected.

Lord Mansfield, in the case of *Bristow v. Wright* (s), in citing the last three cases, observed that they were strong ones, but that they were authorities for the doctrine there laid down, as to the distinction between material and impertinent averments. He added, that he believed that the doctrine stood right, and upon the best footing, as it might prevent the stuffing of declarations with prolix and unnecessary matter, because of the danger of failing in the proof, and might lead pleaders to confine themselves to state the legal effect (t).

Wherever precise sums, quantities, or magnitudes, are essential to the nature of the charge or claim, a variance will be fatal; as, where they are descriptive of a contract, prescription, or written instrument.

In the case of *Grant v. Astle* (u) the declaration alleged a custom for every customary tenant to pay a reasonable fine on his admission, to be assessed by the lord, that a certain tenement was of large annual value; viz. of the annual value of 23*l.* 8*s.* 9*d.*, that the lord had assessed 46*l.* 17*s.* 6*d.* as a fine for the defendant's admission to the tenement, and that this sum was reasonable. It appeared on the evidence * 1545 * that the fine should have been only 46*l.* 4*s.* 3*d.* that sum being two years annual value; and it was held that the evidence did not support the declaration, for the plaintiff had no right to recover any thing but the sum assessed, for the duty arose upon the assessment, and that, by the evidence, appeared to be illegal (x).

In an action for a false and deceitful representation of the annual returns of a business sold to the plaintiff, an averment that the returns amounted to a particular sum, is material, and must be proved, although the sum be alleged under a *videlicet* (y).

(s) Doug. 666.

(t) See also *The Dean and Chapter of Rochester v. Pierce*, 1 Camp. 466. *A. B.*, Dean of Rochester, and the Chapter, declared for the use and occupation of premises held by the defendant, by the permission of the *said dean* and chapter; it appeared that the premises were occupied before *A. B.* was dean. Lord Ellenborough nonsuited the plaintiff; and the Court of K. B. were afterwards divided upon the question whether the variance was fatal.

(u) Doug. 731, in n.

(x) Note, that the vice in this case was in the assessment itself, and could not have been aided by the mode of pleading. And see *Titus v. Perkins*, Skinn. 247; Carth. 13; 3 Lev. 249. 255; 3 Mod. 132.

(y) *Gilbert v. Stanislaus*, 3 Price, 54.

Where the lessor of an estate to *A. B.* declared in covenant against the defendant as the assignee of *all* the demised estate, and on a traverse of the assignment, as in the said declaration mentioned, it appeared in evidence that the defendant was assignee of part only of the demised estate, the variance was held to be fatal (z).

The question, whether an averment is to be considered to be descriptive, and therefore material, depends principally upon the *nature of the averment itself*, and the subject-matter to which it is applied. But, 2dly, in many instances, *the law* pronounces averments to be merely *formal*, which would otherwise, according to the ordinary rule, be deemed to be descriptive. 3dly. In other instances again, the question depends upon the *particular and technical mode* in which the averment is framed. In the first place, *whenever an allegation *limits and narrows* that which is * 1546 essential, it is necessarily descriptive.

Instances of this nature most usually occur in the description of written instruments and matters of contract and prescription.

In the description of libels or other written instruments (a), which are set out according to their tenor, every part necessarily operates by way of description of the whole, for the libel alleged cannot be the same with that proved, when they vary as to any part, however unimportant (b). (1)

So also, averments which apply a libel to a particular subject-matter, are in their nature descriptive of the legal injury, for that depends upon the injurious nature of the meaning conveyed, which frequently arises wholly from the external facts to which the terms of the libel are made to apply by proper averments. The application, there-

(z) *Hare v. Cator*, Cowp. 766.

(a) *Vide infra*, 1586.

(b) *Supra*, 1530. See *Millman v. Pratt*, *supra*, 859; tit. *Libel*. The court of K. B. in a very late decision, Trin. T. 1824, have decided, that where matter is connected with a libel by a colloquium the whole need not be proved.

(1) [See Vol. II. 858, and note (1). The libellous matter set forth in a declaration contained the words *U. States*, and in the paper produced in evidence, it was written *United States*—the variance was held to be immaterial. *Lewis v. Few*, 5 Johns. 1. And where a declaration for a libel stated that it was published in a newspaper, called *The Ontario Messenger*, and the paper produced was headed *Ontario Messenger*, it was held that this was not a variance. *Southwick v. Stevens*, 10 Johns. 443.]

PART
IV.

fore, of the libel to those facts, is descriptive of the injury (c).

* 1547
Descriptive al-
legations can-
not be rejected.

* And where a written instrument is not described by its tenor, but merely according to its substance and effect, if more be alleged in substance and effect than the legal construction of the instrument warrants, the variance will

(c) *Supra*, 861; and see *Teesdale v. Clement*, 2 Chitty's R. 603. So in an action for words spoken of an attorney with reference to a former cause, the proceedings in that cause must be proved. *Parry v. Collis*, 1 Esp. C. 399.

The question, whether partial proof of the matters connected with the libel, by means of an averment, be sufficient, must, it seems, depend upon the nature and quality of the subject-matters so connected. If the allegations altogether form one entire subject-matter, a contract for instance, then no part can be rejected; for the contract being essential to the particular injury, every part of it is essential and descriptive. On the other hand, where the subject-matters of and concerning which the libel is alleged to have been published are in their nature cumulative and divisible, there, it should seem, that in principle such allegations are divisible. If, for example, it were alleged, that before the publication, &c. *M. N.* had committed three several highway robberies and that the defendant published of and concerning the plaintiff, and of and concerning those robberies, this libel: "*A. B.* was accessory to *M. N.*" innuendo in the commission of the said robberies. If on the trial it was proved that *M. N.* had committed two robberies only, the injury would, it seems, be proved *pro tanto* as alleged; for as far as regarded the two robberies, it was truly alleged that he published the libel of and concerning them, and with the intent alleged; and although it was also averred that the libel was published of and concerning a third robbery, as well as of and concerning the two, yet that allegation seems to be rather cumulative than descriptive in its nature. The substance of the complaint is, that the defendant charged the plaintiff with being accessory to three robberies, and the proof is, that he charged him as being accessory to two of them. If, indeed, the allegation had been, that by the terms of the libel itself the defendant charged the plaintiff as accessory to the three, the variance would have been fatal, for this would have been to misdescribe a written instrument. No question, however, of this nature arises: the declaration truly states the instrument itself; the variance is merely as to the extent of its application and injurious effect, and these are divisible in their nature. If in such a case, previous to the statute enabling the defendant to plead several matters, three robberies had been in fact committed, and the defendant could have proved that the plaintiff was accessory to one, he must have pleaded his justification to that extent specially, and pleaded not guilty to the residue; and the facts alleged in the declaration being proved on the one hand, and the justification on the other, the plaintiff would, it seems, have been entitled to a verdict, having truly declared that the libel was published of and concerning the three felonies, and the justification extended to one only. In the case of *Lord Churchill v. Hunt*, 2 B. & A. 685, *supra*, 1535, and *R. v. Sutton*, 4 M. & S. 532, the prefatory allegation seems to have been considered to be divisible.

be fatal, although the allegation on which the variance arises was impertinent (*d*).

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IV.

In cases of contract, the allegations of sums, magnitude, and duration, are usually, in their very nature, * essential to the identity of the contract; they are therefore descriptive, and must in general be proved as laid (*e*), unless the mode of averment show that the party did not profess to state the sum, magnitude, number, &c. precisely.

Contract.
* 1548

Where an action of tort is founded on a contract, a variance from the contract alleged will be as fatal as in an action on the contract itself (*f*); for the tort founded on the contract cannot be the same unless the contract be the same (*1*).

As a contract is in its nature entire, not only will a variance in omitting to prove the whole *consideration* as alleged, be fatal, but so also will an omission to prove the whole of the *promises* alleged to be founded upon that consideration, although the plaintiff prove the promise, and the breach of it, for which damages are sought to be recovered, and although it was unnecessary to state any other promise than that alleged to be broken (*g*) (*2*).

(*d*) *Vide infra*, 1586.

(*e*) *Supra*, 83, 1532. [*Infra*, 1573, note (*1*).] *Guinnet v. Phillips*, 3 T. R. 646. *King v. Pippett*, 1 T. R. 240. A special count in *assumpsit* for not paying a deposit on the purchase of lands, averring that the defendant became the purchaser of divers (to wit, two lots), for divers sums of money, amounting in the whole to a large sum of money (to wit, &c.), is not proved by evidence of the purchasing of two different lots, though upon the same terms, for the agreements are separate in law and fact. *James v. Shore*, 1 Starkie's C. 426; *infra*, 1622.

(*f*) *Weall v. King*, 12 East, 452; *supra*, 1223. *Green v. Greenbank*, 2 Marsh. 485. *Lopes v. De Tastet*, 1 B. & B. 538. [*Snell & al. v. Moses & sons*, 1 Johns. 96. *Perry v. Aaron*, 1 Johns. 129. *Walcott v. Canfield*, 3 Conn. Rep. 194.]

(*g*) *Supra*, 83, 84, 85.

(1) [In an action for a false affirmation in the sale of a horse, a variance between the contract as set forth in the declaration, and the evidence at the trial, was held to be immaterial—the whole gist of the plaintiff's action being the defendant's false affirmation. *Cunningham v. Kimball*, 7 Mass. Rep. 65. *Aliter*, if the action be founded on the contract, and the gravamen be the non-performance thereof by the defendant. *ibid*.

See also *Silver v. Kendrick*, 2 N. Hamp. Rep. 160.]

(2) [See Vol. II. 84; note (*1*). 86, note (*1*). Where the declaration alleged an undertaking by the defendant, in consideration of a contract made by the plaintiff to *build* a ship, and the evidence was of a contract to *finish* a ship, which was partly built, and to sell it

PART
IV.

Prescription.

As a prescription is founded on a supposed grant, and is therefore entire, for the subject-matter granted must necessarily be descriptive of the grant itself, it follows that partial proof of that which is claimed by the prescription is insufficient, although the proof fail only as to part which is not material on the trial. * Thus, where the defendant in an action of trespass prescribed for a right of fishery in four specified places, but proved the right to exist in three of them only, the variance was held to be fatal, although no trespass was proved in the excepted part (h).

* 1549

So a prescription for a right of common, as appurtenant to a messuage and land, with the appurtenants, would not be supported by evidence of a prescriptive right appurtenant to the land only (i).

An allegation of an absolute prescription or custom is not proved by evidence of a conditional or limited one (l).

A prescription to have pot-water out of a river is not proved by evidence that he ought to have it, paying 6d. yearly (m).

So a justification by the lord of a manor, under a custom that the lord should have the best beast on the tenant's death, is not proved by evidence that he ought to have the best beast or good (n).

* 1550 * But the proof of a more ample right than is alleged,

(h) *Rogers & others v. Allen*, 1 Camp. 309. Heath, J. overruled the objection; but the Court of K. B. afterwards granted a new trial. See also *Rotherham v. Green*, Noy, 67; *Conyers v. Jackson*, Clayt. 19.

(i) See *Ricketts v. Salwey*, 2 B. & A. 360; *supra*, 1542. And see *Yarly v. Turnock*, Palmer, 269; *Hickman v. Thorny*, 1 Freeman. 211; *Pring v. Henley*, B. N. P. 59; *Kingsmill v. Bull*, 9 East, 185. It was there alleged as a custom in a manor, that the lord immemorially, until the division of a certain tenement into moieties, had a heriot, and that after the division he had a heriot for each moiety; and it was held, that the whole being one custom was disproved by evidence of a division within the time of memory. Where it was alleged that a vestry had immemorially consisted of a certain number of select persons, it was held to be necessary to prove that it had consisted of a definite number. *Berry v. Banner*, Peake's C. 156.

(l) *Gray's case*, 5 Co. 78, b.

(m) In a Devonshire case, cited by Popham, C. J. in *Gray's case*, 5 Co. 78, b.

(n) *Adderly v. Hart*, Trin. 4 Geo. I. An avowry for a heriot in kind is not supported by evidence of a right to a sum assessed in lieu of a heriot in kind. *Parkin v. Radcliffe*, 1 B. & P. 393.

to the defendant, the variance was held to be fatal. *Smith v. Barker*, Circuit Court, 3 Day, 312.]

will not destroy the identity of a prescription, any more than it would the identity of a grant, for the fact that more was granted than is alleged does not disprove the allegation that so much was granted (o).

PART
IV.

Descriptive
averments.
Actions of
tort.

In actions of tort, not founded on any contract or prescription, the question, whether an allegation be or be not descriptive, is one for the discretion of the Court, exercised upon the nature and circumstances of the particular case.

If the allegation limit and confine that which is material, the latter can never be available to any greater extent, for an averment which limits and restrains in point of magnitude or extent is always so far descriptive. So it is if the allegation limit the quality of that which is material.

In cases of tort, it is sufficient to prove part of that which is alleged, and the only question is, whether the allegation be divisible, and capable of partial proof, or be of so entire a nature that it cannot be separated into parts (p).

Several of the decisions on this head have already been referred to (q).

An allegation as to the character in which the plaintiff sues, or his title to damages, is usually in its nature descriptive, and requires proof (1), although it was superfluous.

Character.

(o) *Supra*, 1533. *Johnson v. Thoroughgood*, Hob. 64. *Bushwood v. Bond*, Cro. Eliz. 722; B. N. P. 29.

(p) See *Ricketts v. Salwey*, 2 B. & A. 360; *supra*, 1542. But note, that Abbott, C. J. said, that if there had been words of connexion, such as "thereunto belonging," or other words of like import, to connect the messuage and land together as one entire tenement, he should have thought that the plaintiff was not entitled to recover.

(q) *Supra*, 1539.

(1) [If an administrator describe himself in the writ as administrator *de bonis non*, and upon oyer of the letters of administration, it appear that he is administrator generally; this is not such a variance as can be taken advantage of by the defendant. *Nicole v. Mumford*, Kirby, 270. See *Crotzer & al. v. Lyon*, 9 Serg. & Rawle, 78. In an action on a single bill, the plaintiff averred, in his statement, that the bill was assigned by himself *John Adam L.*, executor of A. to B., who re-assigned it to the plaintiff, and offered in evidence a bill agreeing in all respects with the statement, except that the assignment was by *Adam L.*, but made "agreeably to the will of A." (it being granted that *John Adam L.* was A.'s executor)—it was held that the evidence was admissible on the issue of *non est factum*. *Lautermilch v. Kneagy*, 3 Serg. & Rawle, 202.

See *McWilliams v. Willis*, 1 Wash. 199, where it was held that if a declaration, on an agreement by the defendant, styling himself "Treasurer, &c." but binding himself personally, omit the description, it is no variance.]

PART
IV.Character.
Title.

ous. As where an action for slandering * a man in his profession or office his appointment is unnecessarily alleged (r).

Where the plaintiff stated that he was proprietor and editor of a newspaper calumniated by the defendant, it was held to be insufficient to prove merely that he was proprietor (s).

Where the issue was, whether *J. S.* devised to *J. N.* and his heirs, or not, and the Jury found that *J. S.* devised to *J. A.* for years, remainder to *J. N.* in fee, the Court adjudged *quod non devisavit modo et forma* (t).

Where the declaration against the maker of a promissory note, payable to the bearer, unnecessarily alleged an indorsement by the payee, it was held that the plaintiff was bound to prove it (u).

Inducement.

Matter of inducement, it is said, need not be precisely proved (x) (1).

(r) *Supra*, 1539.

(s) *Heriot v. Stuart*, 1 Esp. C. 437, Cor. Kenyon, C. J. See also *Stevens v. Aldridge*, 5 Price, 234; *supra*, 1412.

(t) *R. v. Newdigate*, W. Jones, 224, cited Dougl. 666.

(u) *Waynam v. Bend*, 1 Camp. 175.

(x) Per Buller, J. in *Gwinnet v. Phillips*, 3 T. R. 643. Per Chambre, J. in *Smith v. Taylor*, 1 N. R. 210. The distinction between the gist of the action and that which is inducement is not always clear in principle. In *Smith v. Taylor*, which was an action for slandering a physician in his professional character, Chambre, J. considered that his being a physician was the very gist of the action, and therefore required strict proof. In *Gwinnet v. Phillips*, which was an action for fraudulently removing goods to prevent a distress for rent in arrear, Buller, J. said that the averment that rent was due was matter of inducement, and therefore did not require strict proof; yet the fact that rent was due in the latter case was just as essential to the claim for damages, as the fact that the plaintiff was a physician was in the first case. If by inducement such averments only be meant as are not material, but which, if struck out, would leave a valid charge or claim behind, there is no question; but if the term include essential and material averments, then proof being necessary, legal proof is essential, and that must, it should seem, depend upon the nature of the allegation itself, and not upon its mere order or connexion in point of time, or otherwise, with other material averments.

Although Mr. J. Buller, in *Gwinnet v. Phillips*, intimates that proof of the precise sum of 57*l.* alleged to be in arrear, was not necessary, because it was mere inducement, yet it is clear, that if the very same allegation had been made in an action to recover the very sum itself from the tenant as rent in arrear, the precise proof would have been unnecessary; nor is it necessary in any case,

(1) [See *Ripsher v. Shane*, cited Vol. II. 84, note (1).]

* There seems, however, to be little difference in principle between such averments and any other; for if they are essential, they must be proved; and if they be alleged with descriptive circumstances, such description is material. Thus, if the terms of a contract be stated, though unnecessarily, by way of inducement, they must be proved (y).

Matter of
inducement.

2dly. It is next to be observed, that in many instances circumstantial allegations are noticed by the law itself as merely formal, and as requiring no proof.

Formal by
law.

These are to be regarded as exceptions made by the law for convenience sake. Thus, it is laid down as a general rule in the *Trials per Pais* (z), that "where the issue taken goeth to the point of the writ or action, there *modo et forma* are but words of form."

The ground of which seems to be this, that where * certain specific facts or actual results alone are essential * 1553 to support the charge or claim, and the means, manner, and circumstances, occasioning or accompanying such facts or results, are purely immaterial, the latter may, without inconvenience, be regarded as merely formal, although perhaps originally such allegations, as well as those of time and place, might require strict proof.

In trover, for instance, the alleging the mode by which the defendant became possessed of the goods, whether by finding or otherwise, is purely formal, and requires no proof; for the gist of the action is the conversion (a).

So upon indictments for homicide, the allegations of the kind of weapon or poison used to occasion the death need not be precisely proved (b); it is sufficient if the same kind of death be proved with that alleged.

unless from the very nature of the claim or charge the precise sum be material. *Supra*, 1544, and *R. v. Gilham*, 6 T. R. 265.

On the other hand, it is certain, that whenever an allegation is material and essential, whether it fall within the scope of the term *inducement*, or not, or whatever its connexion may be in the order of time, or otherwise, with the other essential averments, it must be proved according to the precise and particular, though superfluous, description with which it is encumbered. *Vide supra*, 640. 1242-1548.

(y) *Bristow v. Wright*, Doug. 665. And so in all cases, of tort where matter of contract is alleged, though but by way of inducement. *Lopez v. De Tastet*, 1 B. & B. 538. *Corney v. Mendez de Costa*, 1 Esp. C. 302. *Weall v. King*, 12 East, 452. [*Supra*, 1548.]

(z) 389.

(a) See *Trover*.

(b) See *Macalley's case*, 9 Co. 65.

PART
IV.Formal by
law.

Macalley's case (c) is a very strong instance to show the extent of this doctrine.

The indictment for the murder of *Fells* alleged that *P.* sheriff of London, upon a plaint entered, issued his precept to *Fells*, serjeant at mace, to arrest *Murray*, but on the evidence it appeared that there was in fact no precept; but that by the custom of London, after a plaint had been entered, any serjeant *ex officio* might arrest the defendant in the suit. But it was held by all the Judges that the variance was immaterial, for the warrant was but one circumstance, which was not necessary to be precisely pursued in evidence to be found by a jury; for the indictment alleged that the prisoner killed *Fells* of malice prepense; and although the evidence varied from the special matter,

* 1554

yet, as it showed that the prisoner * killed *Fells* of malice prepense it maintained the indictment.

Where the demandant, in a writ of entry on an alienation made by the tenant in dower to his disinherison, alleges an alienation in fee, and the tenant pleads that he did not aliene *modo et forma*, as the demandant has alleged, and it is found that the tenant aliened in tail or for life, yet the demandant is entitled to recover; for the real question is, whether the tenant did aliene (*d*).

So if in assize of *darrein presentment* the plaintiff allege an avoidance by privation, and the Jury find an avoidance by death; for the mere *result*, viz. the avoidance, is alone material; the *manner* of it is immaterial (*e*).

So again, if in an action against a wrong-doer for a disturbance of the plaintiff in his office, he mistake his title in the declaration, and the special verdict find a title for him different from that on which he has declared, yet judgment will be given for him notwithstanding the variance (*f*); for as the disturbance occasions the action, the finding the title is held to be purely superfluous.

(*c*) 9 Co. 65.

(*d*) Litt. sec. 483; Trials per Pais, 387.

(*e*) 1 Inst. 282; Trials per Pais, 385. So if guardians of a hospital bring assize against the ordinary, and he pleadeth in his visitation he deprived him as ordinary, whereupon issue is taken, and it is found he deprived him as patron, the ordinary shall have judgment; for the deprivation is the substance of the matter.

(*f*) Cro. Eliz. 336. 419; B. N. P. 76; 1 Will. Saund. 346 (2). *Secus*, if the plaintiff set out an insufficient title. *Dorne v. Cashford*, 1 Salk. 363. *Crowthor v. Oldfield*, 2 Ld. Raym. 1230; 1 Will. Saund. 346, a. note (2.) But on issue joined on a plea of justification, under a right of common, to an action of trespass, or avowry damage-feasant, the title, by prescription or otherwise, must be proved as laid. *Supra*, 1211. *Sir Francis Leke's case*, Dyer, 365;

In these and the like instances the variances are * im-
material, not because such allegations are in their own
nature merely formal, but because the law considers them
to be so with reference to the matter directly in issue ; the
very same allegations, where the point arose *collaterally*,
would be material. For it is also laid down as a rule, that
“where a *collateral* point in pleading is traversed, there
modo et forma is of the substance of the plea (*g*).”

Formal by
law.

And therefore, if a feoffment be pleaded by deed, and the
defendant traverses “*absque hoc quod feoffavit modo et for-*
ma,” the Jury cannot find a feoffment without a deed (*h*).

So if a feoffment by two be alleged, and it be found to
be the feoffment of one only (*i*).

Another distinction is, that although the issue be upon
a collateral point, yet, if by the finding of part of the issue
it shall appear to the Court that no such action lieth, there
modo et forma are but words of form (*k*).

That is, partial and deficient proof may be sufficient
* in law to show that no action is maintainable, although * 1556
by reason of the defect the proof be insufficient to support
the affirmative of the issue, the proof of which lies on the
defendant.

The lord distrains ; the tenant brings trespass. The
lord pleads that the tenant holds by fealty and rent, and
prays judgment of the writ. The tenant replies that he
does not hold *modo et forma*. If the verdict find that the
tenant holds by fealty only, yet the writ shall abate, al-
though the tenant does not hold as the lord has alleged ; for
as the plaintiff was tenant, he cannot maintain trespass

1 Will. Saund. 346, n. (2). Even although it would have been suf-
ficient for the defendant to have relied on his possession alone : as
where the defendant justifies an escape of the cattle from a com-
mon to the close in which, &c. through defect of a fence which
the plaintiff is bound to repair, or an escape from the defendant's
own close (*Faldo v. Ridge*, Yelv. 75) ; for although all that is neces-
sary in such a case is to show that the cattle were not trespassers
in the place from which they escaped, as if the defendant was te-
nant at will, or had a license to put the cattle there, yet if the de-
fendant does not rely upon the averment of possession, but alleges
a precise estate, the averment is traversable. *Sir Francis Leke's*
case, Dy. 365 ; 1 Will. Saund. 346, (2). [Yelv. 195. *a. note* (1). *Da-*
lis. 42. pl. 20 ; 2 Saund. 207, *a. n.* (24).]

(*g*) Trials per Pais, 389 ; B. N. P. 301. See the preceding note.

(*h*) Co. Litt. 282 ; Trials per Pais, 389.

(*i*) Ibid. So if the issue be, whether *A.* and *B.* were church-
wardens, proof that one was, but that the other was not, would
not be sufficient. 2 Roll. 706 ; B. N. P. 299.

(*k*) Co. Litt. 282 ; Trials per Pais, 389 ; B. N. P. 301.

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against his lord, although he distrain for services which he ought not to have (*l*); for the only material question is, whether he holds of him, or not (*m*). But it would have been otherwise in replevin, for there the avowant must make out his title, to have a return according to his allegations (*n*).

Probably in early times precise proof was required of the formal allegations, even of time and place; indeed, the Statute of Gloucester in the case of an appeal of murder required the very hour to be stated; an idle and nugatory enactment, unless proof of the averment were requisite. The *place* was essential for the purpose of awarding the venire.

The inconvenience of requiring strict proof has, in these and many other instances, left the mere form and semblance of precision; and as the law pronounces such allegations to be purely formal, they deceive no one.

Videlicet.

3dly. In some instances precise proof is rendered unnecessary by the form of allegation (*o*), which shows * that the party did not mean to bind himself to precise proof; as where sums or magnitudes are averred under a *scilicet* or *videlicet*, the effect of which is to render precise proof unnecessary, in some instances, where it would otherwise have been essential (*p*); although it never renders precise proof unnecessary where from the nature of the case it is otherwise essential (*q*). Neither does the want of it ever render precise proof necessary, where from the nature of the case it is not essential (*i*).

Where the consideration was alleged to be the forbearance of 21*l.* 6*s.* without a *videlicet*, and the proof was of a forbearance of 20*l.* 18*s.*, the variance was held to be fatal (*r*).

(*l*) Co Litt. 282; Trials per Pais, 387; B. N. P. 301.

(*m*) By the stat. of Marl. c. 3.

(*n*) B. N. P. 302.

(*o*) See the observations of Chambre, J. 1 N. R. 210.

(*p*) See 2 Will. Saund. 291. *R. v. Aylett*, 1 T. R. 63; Stark. Crim. Plead. 252, 2d edit. *Symmons v. Knox*, 3 T. R. 65. [2 Pick. 222.]

(*q*) *Infra*, 1558; 4 Taunt. 320; 1 T. R. 656. [*Vail v. Lewis & al.* 4 Johns. 450; *Bissel v. Drake*, 19 Johns. 66.]

(*i*) An allegation under a *videlicet*, that the Court was sitting on a day out of term, may be rejected as surplusage, *Lockett v. Plumber*, 2 B. & B. 659; and see *Draper v. Garratt*, 2 B. & C. 2. *Supra*, 1534. An allegation of a promise to remove goods within a reasonable time is satisfied by evidence of a promise to remove them in a month, *Hore v. Milner*, Peake's C. 42, *a*.

(*r*) *Arnfield v. Bate*, 3 M. & S. 173. So where the consideration

But where the declaration alleged that S. F., the father of the defendant, was indebted to the plaintiff in a certain sum, *to wit*, the sum of 26*l.* 13*s.* 6*d.*, being the *unpaid balance* of a larger sum; and that in consideration of the plaintiff's forbearance to sue for the recovery of the balance of 26*l.* 13*s.* 6*d.*, the defendant undertook to accept a bill for the amount of the balance of 26*l.* 13*s.* 6*d.*, and the balance really due was 26*l.*, it was held to be no variance, the payment of the balance being the consideration for the promise, * and the statement of a particular sum was unnecessary (s). * 1558

But it is a general rule that a *videlicet* will not protect, where precision is rendered essential by the nature of the case.

The defendant avowed that the plaintiff held certain lands of him, as his tenant, at a certain rent, *to wit*, at 110*l.* rent, payable half-yearly; upon *non tenet* pleaded, it appeared that the land had been let by a written contract at 15*s.* per acre, and that the whole amounted to 111*l.* per annum; and the variance was held to be fatal (t).

Where the defendant pleads a set-off to a bond the averment of the sum really due is material, and traversable, though laid under a *videlicet* (u).

for the purchase of sheep was alleged to be 54*l.* 11*s.* 6*d.*, and turned out to be 54*l.* 12*s.* 6*d.* *Durston v. Tuthan*, cited in *Symmons v. Knox*, 3 T. R. 67; 2 Will. Saund. 291, c.

In the case of *Laing v. Fidgeon* (6 Taunt. 108), it was held that an allegation of a contract to deliver saddles to the plaintiff at a reasonable price, was supported by proof of an agreement to deliver saddles at 24*s.* and 26*s.* And it seems, that if the declaration state the consideration to be certain reasonable reward, proof that a specific sum was agreed on will not be material as to variance. *Bayley v. Tucker*, 2 N. R. 458.

(s) *Bray v. Freeman*, 2 Moore, 114. [8 Taunt. 197. S. C.]

(t) *Brown v. Sayce*, 4 Taunt. 320. Note, that Mansfield, C. J. said that the record would certainly be evidence as to the amount of the rent between the same parties in another action. So where the plaintiff alleged that he had agreed to sell, and the defendant to buy, certain goods and merchandises (*to wit*, 328 chests and 30 half-chests of oranges and lemons), at and for a certain price (*to wit*, the price of 623*l.* 3*s.*), and the contract proved was for 300 chests and 30 half-chests of China oranges, and 20 chests of lemons, it was held to be a fatal variance. *Crispin v. Williamson*, 1 Moore, 547. [8 Taunt. 107, S. C.] See also *Green v. Rennett*, 1 T. R. 656. *White v. Wilson*, 2 B. & P. 116; *infra*, 1560. *Pope v. Foster*, 4 T. R. 590. *Grimwood v. Barritt*, 6 T. R. 460. *Johnson v. Pickett*, cited *ibid. infra*, 1570. *Bristow v. Wright*, Dougl. 665. *R. v. Mayor of York*, 5 T. R. 71. *Gilbert v. Stanislaus*, 3 Price, 54; *supra*, 1545.

(u) *Grimwood v. Barritt*, 6 T. R. 460.

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But the want of a *videlicet* will never do harm where, from the nature of the case, the precise sum, date, place, magnitude, or extent, is unnecessary (x).

- * 1559 It is scarcely necessary to remark that partial proof is in no case sufficient, unless the facts proved, if alleged alone, would have constituted a ground of action, or of criminal charge of the nature alleged.

Thus, although on a charge of murder the prisoner may be found guilty of manslaughter merely, yet upon a charge of felony he cannot be convicted of a misdemeanor, although the facts proved constitute a misdemeanor (y).

Excess of
proof,

In the next place, the proof of more facts, circumstances, and particulars, than are alleged, will not be material, unless that which is so proved, but not alleged, be so inconsistent with some essential allegation as to disprove it altogether. Proofs in their very nature must ordinarily be particular, although the allegations be general, and therefore mere simple redundancy of proof is usually unimportant.

If a man be charged with stealing ten sovereigns, proof that he stole twenty is no variance as to the legal identity of the offence, for it is still true, as alleged, that he stole ten.

Proof that a party has a right for a stated time, proves also that he has the right on a particular day included within that time (z).

Proof of the tender of a larger sum supports an allegation of the tender of a smaller sum (a).

Proof of a prescriptive right more ample than that which is alleged establishes that right as far as it is claimed (b).

Evidence that a *modus* exists in respect of several farms or closes proves an allegation that it exists with respect to one of them (c).

- * 1560 * An allegation that a bill of exchange was drawn upon and accepted by *A. B. & C.* is proved by evidence of a

(x) *R. v. Gilham*, 6 T. R. 265; *supra*, 1539. *Gwinnet v. Phillips*, 3 T. R. 643. *R. v. Burdett*, 1 Ld. Raym. 149; 2 Camp. 231.

(y) *R. v. Westbeer*, 2 Str. 1133; Stark. Crim. Pleadings, 2d edit. 345, 6.

(z) 1 Brownl. 178.

(a) *Supra*, 1391.

(b) *Supra*, 1550. 1 Ford's MS. 404; 4 T. R. 160; Skinn. 347. *Bruges v. Searle*, Carth. 219.

(c) *R. v. Walker*, Ford's MS. 404.

bill drawn on and accepted by them jointly with a fourth (d).

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So also an averment that money was received by *A.* is proved by evidence of a receipt by him jointly with a deceased partner (e).

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Proof.

An averment that *A.* was bound by a deed is proved by evidence that *A. & B.* bound themselves (f).

Proof that *A. B.* supplied the poor of *W.* and of other parishes with provisions, satisfies an allegation that he supplied the poor of *W.* (g).

So if upon a charge of libel, or of breach of covenant or promise, it appear in evidence that the defendant published a libel containing not only the matter charged, but containing also additional injurious matter; or that he further covenanted or undertook to do some other thing, the breach of which further covenant or promise is not complained of, the additional evidence would be immaterial, for the charge or claim would still remain fully established to the extent alleged (h).

But whenever that which is proved, in addition to that which is alleged, is descriptive of it, and affects its identity, the variance is fatal, for that which is essential to a correct description has been omitted.

If it appear in evidence that part of a libel, covenant or promise, proved, but not alleged, qualifies or * alters the * 1561 sense of the libel, covenant or promise stated, the variance would be fatal, for the addition disproves the allegation.

Thus if the plaintiff declare on a covenant to repair at all times, and the covenant in fact contain the additional words "and at farthest within three months after notice," the variance is fatal (k).

So if the plaintiff declare on an absolute promise, and a conditional one be proved (l).

(d) *Mountstephen v. Brooke*, 1 B. & A. 224.

(e) *Richards v. Heather*, 1 B. & A. 29.

(f) *Supra*, 477. *South v. Tanner*, 2 Taunt. 254. [4 Camp. 35.]

(g) *West v. Andrews*, 1 B. & C. 77.

(h) *Supra*, 1532. 845. *Squier v. Hunt*, 3 Price, 68. *Miles v. Sheward*, 8 East, 7. *Handford v. Palmer*, 2 B. & B. 359.

(k) *Horsefall v. Testar*, 1 Moore, 89. [7 Taunt. 385, S. C.]

(l) *Supra*, 83. See *Tate v. Wellings*, 3 T. R. 531. *White v. Wilson*, 2 B. & P. 116. *Layton v. Pearce*, Dougl. 16. *Churchill v. Wilkins*, 1 T. R. 447. *Secus*, if the condition merely affect the quantum of damages on a breach of contract. *Clarke v. Gray*, 6 East, 564. *Parker v. Palmer*, 4 B. & A. 387. *Thornton v. Jones*, 2 Marsh. 287. [6 Taunt. 581, S. C.]

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Proof.

So if it be alleged as an absolute covenant or promise, and an exception, qualification, or limitation, be annexed to it (m); as, if a covenant be alleged to repair generally, and the covenant proved contain an exception of casualties by fire (n). (1).

* 1562 Where a declaration for assaulting a constable in the execution of his office alleged that he was constable of a particular parish, and the proof was that * he was sworn in for a liberty, of which the parish was part, the variance was held to be fatal (o).

So if part only of a person's name be averred (p).

Upon the same principle, a plea of tender of half a year's rent, simply, is not proved by evidence of the tender of half a year's rent requiring the lessor to give change, and pay back the property tax (q).

It has even been held, that where a statute, in describing the subject-matter of aggravated larceny, uses a general term, and also a specific one, it is not sufficient to use

(m) See *Brown v. Knill*, 2 B. & B. 395. As, if the promise be alleged as an absolute promise, and the proof be of a promise in the alternative. *Penny v. Porter*, 2 East, 2. *Cooke v. Munstone*, 1 N. R. 351. See also *Howell v. Richards*, 11 East, 633. *Tempany v. Burnard*, 4 Camp. 20.

Where the declaration in debt for rent alleged a demise for 15l. rent per annum, under a power to make leases for twenty-one years, and the evidence was of a demise for 15l. rent per annum, and three fowls, under a power to make leases for twenty-one years in possession, and not in reversion, rendering the ancient rent, and not dispunishable of waste, the variance was held to be fatal, both in misdescribing the power as general when it was special, and in misdescribing the rent. *Sands v. Ledger*, 2 Ld. Raym. 792.

(n) Ibid. An allegation of an undertaking to carry from L. to D. and there to deliver, &c. is not satisfied by evidence of an undertaking to carry and deliver, &c. fire and robbery excepted. *Latham v. Rutley*, 2 B. & C. 20.

(o) *Goodes v. Wheatly*, 1 Camp. 231.

(p) *Arbouin v. Willoughby*, 1 Marsh. 477; *infra*, 1578.

(q) *Robinson v. Cooke*, 6 Taunt. 336.

(1) [An averment of a demise for three years is not supported by proof of a lease for one year certain, and two years further possession on the same terms by consent of the landlord. *Alexander v. Harris*, 4 Cranch, 299. Where the allegation was that the defendant undertook to transport certain goods to C. at his own risk, against all danger, except the dangers of the seas, and the paper offered in evidence showed that the defendant took on himself all risks except those of the seas, the variance was held fatal. *Bridge v. Austin*, 4 Mass. Rep. 115. Liability for the risk of transportation, except that of the seas, is materially different from liability for all risks, with the same exception.]

the general for the specific description, where the latter is applicable (r).

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In assumpsit the consideration is of so entire a nature, that not only must it be proved to the extent alleged, but an omission to allege any part is fatal; for if any part be omitted, then the basis of the promise is mis-described; it is not true, as stated, that the defendant's promise was founded upon the consideration alleged, when it was in fact founded upon that and something else which is also essential to its support (s).

Contract.

Where a sailor declared for wages, and the average price of a negro slave, due to him in consideration of service during a certain voyage, "to wit, a voyage from London to the coast of Africa, and from thence to the West Indies," and in the articles it was described as "a voyage from London to the coast of Africa, from thence to the West Indies or America, and afterwards to London in Great Britain, or to some *delivering port in Europe," * 1563 the variance was held to be fatal, notwithstanding the *scilicet* (t).

But if the additional matter proved does not alter the legal effect of that which is alleged, the variance will be immaterial. Thus an allegation of a contract for the delivery of gum Senegal is supported by evidence of a contract for the delivery of *rough* gum Senegal, coupled with evidence that all gum Senegal on its arrival in this country is called *rough* (u).

So where the declaration alleged that the defendant bought of the plaintiff a quantity of East India rice, ac-

(r) *R. v. Cooke*, Leach's C. C. L. 123, 3d edit.

(s) *Swallow v. Beaumont*, 2 B. & A. 765; *supra*, 430.

(t) *White v. Wilson*, 2 B. & P. 116.

(u) *Silver v. Heseltine*, 1 Chitty's R. 39. See also *Parker v. Palmer*, 4 B. & A. 387. So where the plaintiff declared that the defendant had agreed to buy of the plaintiff a large quantity of head-matter and sperm-oil in the possession of the plaintiff, and the contract proved was for the purchase of all the head-matter and sperm-oil per the Wildman, it was held that there was no variance; for the allegations were proved as far as they went, and the additional matter proved (that it was oil by the Wildman) was immaterial; it did not qualify or annex any condition to what was stated. *Vide infra*, 1566. But it seems, that if the declaration alleged an agreement for goods expected by particular ships, a variance would be fatal; as, if the declaration allege an agreement to sell goods expected by the Fanny Almira, and the agreement proved is for the goods expected by the Fanny and Almira (*Boyd v. Sifkin*, 2 Camp. 326). So an agreement alleged to be for the delivery of all merchandisable skins varies from the proof of a contract to deliver all merchandisable *calf*-skins. B. N. P. 145.

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Legal effect.

the act to be done, although they be absent at the time of the act; and in the case of homicide, an allegation that *A.* struck the fatal blow, and that *B.* and *C.* were present, aiding and abetting, is satisfied by evidence that *B.* struck the blow, and that the others were present aiding and abetting, for in point of law the act of one is the act of all (*c*).

If the terms used in the allegation and proofs be convertible in fact, the variance will not be material.

In *assumpsit* on an agreement to take certain stock at a valuation, an allegation that a valuation made amounted to a specific sum, is satisfied by evidence of a valuation to that amount, setting forth the price of each article, with a condition that if any of the pans should prove to be broken the first time of using, an allowance should be made thereon, there being no evidence that any of the pans were broken at the time specified (*d*).

* 1567

* An allegation of a contract to deliver stock on the 27th of February, is satisfied by evidence of a contract to deliver on the settling day, coupled with proof that the 27th was fixed for and understood by the parties to mean the 27th (*e*).

The plaintiff declared on a contract for the purchase of a certain quantity, to wit, eight tons of goods; the proof was of a contract for the purchase of *about* eight tons; the precise quantity, which was not known at the time of the contract, having been ascertained to be eight tons, and it was held that the variance was not material (*f*) (1).

(*c*) *Fost. Disc.* 351; 9 *Co.* 67; *Plow.* 98; 1 *Salk.* 334, *infra*, 1585.

(*d*) *Welch v. Fisher*, 2 *Moore* 378. [8 *Taunt.* 338. *S. C.*] In *Payne v. Hayes*, 1 *Str.* 74; *B. N. P.* 145; where the contract declared on was to deliver stock on the 22d of August, and the evidence of the entry in the broker's book was a contract for the opening, the variance was held to be fatal, although it was proved to be notorious that the books were to open on the 22d, and the broker swore that he took the 22d and the opening to be convertible terms. But this is to be considered rather as a mode for getting rid of a South Sea contract, than as a precedent. But an allegation of an agreement to take a full cargo is not satisfied by proof of an agreement to take on board 500 quarters of wheat, although that quantity amounted to a full cargo. *Harrison v. Wilson*, 2 *Esp. C.* 708. *Vide supra*, 1563, note (*u*).

(*e*) *Wickes v. Gordon*, 2 *B. & A.* 335. See the preceding note.

(*f*) *Gladstone v. Neale*, 13 *East.* 410. And see *Crispin v. William-son*, 8 *Taunt.* 107. [1 *Moore*, 547. *S. C.*]

(1) [A sale note in these words—"sold E. I. H. 2000 gallons prime quality winter oil," &c. may be declared on as an undertak-

An allegation that *A. B.* became bankrupt cannot be proved but by evidence of a commission (*g*). It is not sufficient to show that a commission might have been supported (*h*).

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All averments in terms which have an authorized legal sense and meaning annexed to them must be understood in that sense, and are not satisfied by proof according to the popular and vulgar sense (*i*).

Several of the decisions on the subject of variance are noticed in considering the evidence on the particular subjects with which they are connected. It may be proper, however, in this place, to refer to some of the most general applications of the foregoing principles, particularly with reference to allegations of time (*k*) and place (*l*)—parties, and their names (*m*)—their acts (*n*) and the consequences of such acts (*o*)—intentions (*p*)—written instruments (*q*), &c.

* A variance from the formal allegation of the time of committing an act is not material, where it is proved to have been committed before the commencement of the suit (*r*), or the finding of the bill by the Grand Jury in criminal cases (*s*).

And *autrefois acquit* upon an indictment laying the offence on one day, may be pleaded to an indictment laying the offence to have been committed on a different day (*t*).

Although arson be alleged to have been committed in the night-time, the offence need not be proved to have been committed in the night-time (*u*).

But where in a declaration the injury is laid with a *continuando*, although the plaintiff may prove any number of acts within the time specified, yet if he go beyond that

(*g*) *Bulkeley v. Lord*, 2 Starkie's C. 406.

(*h*) *Ibid.*

(*i*) *Supra*, 1038. 527. *Doe v. Benson*, 4 B. & A. 588.

(*k*) *Infra*, 1568. (*l*) *Infra*, 1570. (*m*) *Infra*, 1577.

(*n*) *Infra*, 1586. (*o*) *Infra*, 1583. (*p*) *Infra*, 1586.

(*q*) *Infra*, 1586.

(*r*) 2 Haw. C. 46, s. 179; 2 Inst. 318.

(*s*) *Ibid.* [*The State v. Haney*, 1 Hawks, 460.]

(*t*) *Syer's case*, 3 Inst. 230. *R. v. Vane*, Keb. 164. 2 Hale, 244.

(*u*) *R. v. Minton*, East's P. C. 1021.

ing that "the oil was of a good and superior quality, to wit, prime quality winter oil;" there being no material variance. *Hastings v. Lovering*, 2 Pick. 214.]

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Time.

limit he is confined to a single act, for the allegation, as far as regards the continuation and number of injuries, is descriptive (x).

- * 1569 If the facts *A.* and *B.* be each of them material, but their priority in point of time be immaterial, a variance from the priority as alleged will not be material (y); as, if a declaration on a policy of insurance allege that * *after* the making the policy the ship sailed, when in fact she sailed *before* (o) (1).

Where the consideration for a guarantee for 5,000*l.* was alleged to be credit to be given by *C. & Co.* to *D. & Co.* in a manner *then* and there agreed upon between the parties, and the proof of the guarantee consisted in evidence of several letters from the defendant, in one of which he stated that he had given the guarantee for such arrangements as *might* be entered into, it was held that there was no variance from the legal effect (p).

(x) See *Trespass*; and *supra*, 1565. But upon the trial of a traverse of an inquisition in the Exchequer, which found that a Crown-debtor was indebted to the Crown in a specific sum for duties due between two assigned periods, and it appeared in evidence that the debtor was indebted in a different sum for duties accruing for a different period, it was held that the period alleged might be rejected as surplusage. *R. v. Franklin*, 5 Price, 614.

(y) *Peppin v. Solomons*, 5 T. R. 496. *Young v. Wright*, 1 Camp. 139; Doug. 497. 515. *Matthie v. Potts*, 3 B. & P. 23. *Secus* where the time is material. *Abibol v. Bristow*, 6 Taunt. 464. [2 Marsh. 157. S. C.]

(o) *Ibid.*

(p) *Iving & others v. Mackenzie*, 1 B. & B. 523.

(1) [Where the time of doing a thing is material, it must be proved as laid: Thus where a declaration in covenant set forth articles of agreement, by which the plaintiff agreed to sell lands to the defendant, for which the defendant was to pay a certain sum on the 27th May, 1812, and the residue on the 1st May, 1813, and on the first payment being made, the plaintiff was to deliver a deed of conveyance; and the plaintiff then averred that he did deliver a deed on the 27th May, 1812, which the defendant then accepted, but that the defendant, though he made the first payment on the 27th May, 1812, failed to pay the residue on the 1st May, 1813—it was held that the time of making the conveyance was material, and therefore that under the declaration, evidence of a deed executed and delivered on the 3d May, 1813, was inadmissible although the plaintiff offered to prove, by parol testimony, that such deed was accepted by the defendant, and recorded at his instance. *Jordan v. Cooper & al.*, 3 Serg. & Rawle, 564. Gibson, *J. dissenting*. So, evidence that the time, &c. of performing a contract was altered by a subsequent agreement, will not support a declaration on the contract as originally made. *Philipps & al. v. Rose*, 8 Johns. 392.]

In the same case, another count alleged the consideration for a guarantee for 8,000*l.* to be that *C. & Co. would* give *V. & Co.* credit in manner *then* and there agreed upon, and it was held that there was no legal variance, although it appeared from the letters that *C. & Co.* had then credited *V. & Co.* to the amount of 5000*l.* of the 8000*l.* under the former guarantee (*q*). Time.

But an allegation of an *executory* consideration is not satisfied by evidence of an *executed* consideration (*r*).

An allegation that a party is possessed for the remainder of a term of years is satisfied by evidence that he is tenant from year to year (*s*); or for a fraction of a year (*t*).

Where the defendant in replevin avowed the taking as a commoner damage-feasant, and the plaintiff alleged that *J. S.* was seised of a house and land, whereto he *had *1570 common, and that he demised to him to hold from the 25th day of March next before for a year, and the defendant traversed the lease *modu et forma*, and the Jury found that *J. S.* made a lease to the defendant on the 25th of March, for one year, it was held that the plaintiff was entitled to judgment (*u*).

The allegation of place is either merely formal, or it is Place. descriptive; where it is merely formal, proof is unnecessary, and even on indictments on criminal charges (*x*), and

(*q*) *Irving & others v. Mackenzie*, 1 B. & B. 523.

(*r*) 3 Lev. 98; Com. Dig. Action on the case—Assumpsit, F. 6. *Secus*, where an *executed* consideration is alleged, and the law implies the duty. *Streeter v. Horlock*, 1 Bing. 34.

An allegation by way of consideration that *A.* had paid a sum of money, is not supported by evidence of consideration that *A.* would pay that money. *Amory v. Meryweather*, 2 B. & C. 573. [See also *Bender v. Manning*, cited Vol. II. 84, note (1).]

(*s*) *Botting v. Martin*, 1 Camp. 317.

(*t*) Litt. s. 67.

(*u*) *Pope v. Skinner*, Hob. 72; B. N. P. 300. The reason assigned is, that although the lease proved was not the same with that alleged, yet that the substance of the issue was, whether the plaintiff had such a lease as entitled him to use the common. But it was said, that he must not depart altogether from the form of the issue, as if it had been proved that he had a right of common by lease from another.

(*x*) 2 Haw. c. 46, s. 181; 1 Salk. 288; 2 Hale, 291; Kel. 13. 33. By the provisions of the stat. 7 Hen. V.; 9 Hen. V. c. 1; 18 H. VI. c. 12; if there be no such vill or place within the county, the indictment is void. The objection was taken in the case of *Rex v. Phillips*, 3 Camp. 73, before Lawrence, J. on the Oxford Circuit, Summ. Assizes, 1808, and the learned judge reserved the point; but the prisoner was afterwards acquitted.

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IV.

Place.

in actions for local offences, it is sufficient to prove the offence to have been committed within the county (y).

Where it is doubtful whether the allegation be merely formal, or it be descriptive, the allegation will be referred to venue, rather than to description (z), even although the action be of a local nature (a), and the existence of such a parish will be immaterial (b).

- * 1571 * And where the place of doing an act is precisely alleged, if the description be *wholly immaterial*, the ground of charge or of complaint not being local, the description may, it seems, be rejected as surplusage. As, if a robbery be alleged to have been committed near a highway, when it was in fact committed in a dwelling-house, and not near a highway (c); or in a field near the highway, and the Jury find that it was not committed near the highway (d); or in the dwelling-house of *A. B.* where the ownership cannot be proved (e), the variance is immaterial, for the statute (3 & 4 W. & M. c. 9,) takes away clergy generally.

(y) See *Warren v. Webb*, 1 Taunt. 379; *infra*, 1574, note (l); Cro. Eliz. 911; Yel. 12. In an action for running foul of posts fixed in a river supporting the plaintiff's wharf, it is necessary to prove the posts or wharf to be at the place alleged, under a *videlicet*. *Hamer v. Raymond*, 5 Taunt. 789. [1 Marsh. 363. S. C.] *Supra*, 969.

(z) *Jefferies v. Duncombe*, 11 East, 226; *supra*, 351; 2 Camp. 3; 4 T. R. 561. n.

(a) 2 East, 437; *supra*.

(b) 11 East, 226; 2 Camp. 3. *Kirtland v. Pounsett*, 1 Taunt. 570; where, in an action for use and occupation, it was held to be unnecessary to state in what parish the premises are situate; and that if the parish be described by a wrong name, it is immaterial, if it be described by a name generally known, and which therefore could not mislead the defendant. But see *Wilson v. Clark*, 1 Esp. C. 273; and *Pool v. Court*, 4 Taunt. 700.

(c) *R. v. Summers & others*, East's P. C. 785. *Fowler's case*, *Ibid*. *R. v. Darnford & Newton*, *Ibid*.

(d) *Wardle's case*, East's P. C. 785.

(e) It was so held in *Pyc's case*, (East's P. C. 785,) where the robbery was laid to have been committed in the dwelling-house of Aaron Wilday, and the robbery was proved, but it did not appear who was the owner, and the variance was held to be immaterial. So in *Johnston's case*, where the robbery was alleged to have been committed in the dwelling-house of Joseph Johnston, and it appeared that the robbery was committed by the prisoner, Sarah Johnston, in the dwelling-house of her husband, but his Christian name did not appear. East's P. C. 786.

But in *Duror's case* (Leach's C. C. L. 290), where the prisoner was indicted under the Black Act for maliciously shooting at A. Sanders, in the dwelling-house of James Brewer and John Sanday, and it appeared that the Christian name of Brewer was not *Jamcs*,

* So in an action for running down the plaintiff's boat in the Thames, near the Half-way Reach, proof * that it

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but *John*, the variance was held to be fatal. But the words of the stat. (9 Geo. I. c. 22,) are "who shall maliciously shoot at any person in any dwelling-house or other place." This case, which was decided by Hotham, B. seems to have been completely overruled by *Pye*'s case, which was later, and decided by *all* the Judges. (1) * 1573 Place.

It has been said, that where an injury is partly local, and partly transitory, and a precise local description is given, a variance in proof of the place is fatal to the whole; for the whole being one entire fact, the local situation becomes descriptive of the transitory injury. (*R. v. Cranage*, 1 Salk. 385.) The defendants were indicted for riotously assembling at the parish of St. Giles in the Fields, and breaking and entering the bed-chamber of Sarah S. in the dwelling-house of David *James*, and taking and carrying away thirty yards of stuff. Upon evidence, it appeared to be the dwelling-house of David *Jamson*; and Lord C. J. Parker held that the indictment could not be supported; and he said that this was not like the case 2 Roll. Ab. 677. And he cited *The Queen v. Sudbury*. Indictment for an assault and battery laid as a riot; two were acquitted, and two found guilty, and all were acquitted; for the crime was the riot, and the whole offence was charged under that specification and description. So of the playhouse. Indictment for acting a play, and speaking obscene words in such a parish, in a playhouse in Lincoln's-Inn Fields; if there be no playhouse in Lincoln's-Inn Fields the defendant must be acquitted; for though the words are not local, yet these are made so. One may make a trespass local that is not so. If the speaking had been alleged in Lincoln's-Inn Fields, then it had been laid as venue; but here it is otherwise, for here it is alleged as a description where the playhouse stood. In the principal case, part is local, and part is not local; the *cubiculum* is local; the taking and carrying away is not local; but all is put together as one entire fact, under one description, and you cannot divide them. See also 2 Haw. c. 46, s. 181, which cites the case of *R. v. Cranage*, and Fielding's Penal Law, 317; and lays it down too generally, that if an offence be laid in a parish, in the house of *J. S.*, a variance will be fatal. This position, however, is contrary to the cases above cited, and is not warranted by the case of *R. v. Cranage*, 1 Salk. 385, which was founded on the consideration that the offence was *partly local*.

And where a trespass to goods is alleged in the same count with a local trespass, a transitory count has been held to be necessary in order to avoid locality. *Smith v. Milles*, 1 T. R. 475.

In Buller's N. P. 5, it is laid down, that if it be alleged in an action for slander that the defendant in *clausa ecclesie* Litchfield, spoke the words, the place being laid not as a venue, but as a description of the offence, must be proved. But a *quare* is subjoined in the margin. Yet, notwithstanding the above authorities, considering that it is settled that a defendant may be found guilty of

(1) [An indictment for a riot in pulling down a dwelling-house, as well as for burglary, must set forth correctly whose house it is; and therefore where the indictment charged that it was the dwelling-house of *A.*, and it appeared that *A.* was a feme covert, a new trial was granted. *The State v. Martin*, 2 Murphey, 533.]

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IV.

Place.

was done in the Half-way Reach is sufficient, the place being perfectly immaterial (*g*).

But it seems that wherever the allegation of place is descriptive of the terms of a contract, the proof must correspond with the averment. (1)

Thus, if in an action against a carrier the contract be alleged to be to carry from *A.* to *B.*, the *termini* are material (*h*).

part of that with which he is charged, if it amount to an indictable offence, *qu.* whether he may not be convicted of that which is merely transitory, although the prosecutor fail as to the local part by reason of variance. See the case of *R. v. White*, East's P. C. 780; Leach's C. C. L. 286. *R. v. Woodward*, East's P. C. 780; Leach's C. C. L. 287; where, although it was held that the prisoners could not be found guilty, either of burglary, or under the stat. of Anne, of stealing in a dwelling-house to the amount of 40s., by reason of variance in the name of the owner of the dwelling-house, yet it does not appear that the objection was held to extend to the simple larceny. And in *R. v. Davis*, East's P. C. 780, where the prisoner was acquitted of a burglary alleged to have been committed in the dwelling-house of William Pearce, and it appeared that it was the house, but not the dwelling-house of Pearce, the prisoner was recommended to mercy upon condition of transportation.

As a defendant may be convicted of the transitory part of an offence, though he be acquitted of the local part; and as it seems to be now established, that if the transitory part alone had been charged he might have been convicted, notwithstanding the variance from such local description, it seems to follow that he may be convicted of the transitory part alone, notwithstanding such a variance; for as neither mere locality alone, nor the omission to prove the whole of the charge, would have been fatal, it is difficult to conceive why the conjoint variance should be fatal.

(*g*) *Drewry v. Twiss*, 4 T. R. 558.

(*h*) *Tucker v. Cracklin*, 2 Starkie's C. 385. See also *White v. Wilson*, 2 B. & P. 116; *supra*, 354. *Lopez v. De Tastet*, 1 B. & B. 538. In the case of *Frith v. Gray* (4 T. R. 561, *n.*), in an action for not procuring the plaintiff a booth at a horse-race to be run on Barnet Common, in the county of Middlesex, it was proved that the whole of Barnet Common was in the county of Hertford. But Lord Mansfield and the rest of the Court, on a motion for a new trial, on the ground of variance, held, that as it was perfectly immaterial whether Barnet Common was in Middlesex, or not, those words might be rejected as surplusage. *Sed qu.*

A declaration alleging a retainer, to cause the plaintiff's ship to proceed to *Gottenburgh*, in order that she might afterwards proceed to *Petersburgh*, is not proved by evidence of a retainer to cause the ship to proceed to *Gottenburgh*, and afterwards, under

(1) [In a special action on the case, where the declaration laid a promise to pay 11*l.* 5*s.* at *A.* and the proof was of a promise to pay 11*l.* 13*s.* 4*d.* at *B.* the variance was held to be fatal. *Umbechocker v. Russell*, 2 Yeates, 339.] ●

So where the defendant's tenancy of land in *F.* was * alleged to be the consideration of his promise to treat it in a husband like manner, and it was proved that the land was in *F. & C.*, the variance was held to be fatal (*i*).

* 1574
Place.

So in an action of covenant on a lease of coals, where the declaration alleged the lands to be situate in the parish of *B. & M.* instead of in the parishes of *B. & M.* (*k*).

An action for a nuisance to the plaintiff's real property, whether corporeal or incorporeal, is local, and the action must be brought in the county where the property is situate (*l*).

But it is not necessary to describe the precise local situation either of the property injured, or of the gravamen (*m*).

And unless a precise description be given, the place mentioned will be ascribed to *venue*, and not considered to be descriptive (*n*).

But if in such case a precise local description be given, it must be proved as laid, and a variance will be fatal (*o*).

Proof that the place is usually and commonly known by the description used in the declaration is sufficient.

Where, in an action for a nuisance to the plaintiff's * house, "at Sheerness in the county of Kent," it was * 1575 proved that the house was situated in the adjacent parish of Minster, but that both places were usually known by the name of Sheerness, it was held to be sufficient (*p*). (*l*)

particular conditions, to *Petersburgh*. *Lopes v. De Tastet*, 1 B. & B. 538.

(*i*) *Pool v. Court*, 4 Taunt. 700.

(*k*) *Morgan v. Edwards*, 2 Marsh. 96. [6 Taunt. 394. S. C.] *infra*, 1577. But it was also held, that an allegation that the lands were in the occupation of *A. B.* and *C.*, instead of in the *several* occupations of *A.*, *B.*, and *C.*, was sufficient.

(*l*) *Mersey and Irwell Navigation Company v. Douglas*, 2 East, 497. And where no local situation in such case is alleged, it will be presumed to be situate in the county specified in the margin (*Warren v. Webb*, 1 Taunt. 379). Thus, an allegation, that the defendant suffered a spout to be out of repair at *A.* in the county of *B.*, is equivalent to an averment that it was situated there. *Warren v. Webb*, 1 Taunt. 379.

(*m*) *Mersey & Irwell Navigation Company v. Douglas*, 2 East, 497.

(*n*) *Ibid*.

(*o*) 2 East, 500; *supra*, 350. *Hamer v. Raymond*, [1 Marsh. 363.] 5 Taunt. 789. *Supra*, 1570.

(*p*) *Burbidge v. Jakes*, 1 B. & P. 225. And *semble*, the allegation might at all events have been referred to *venue*. *Vide supra*, 1570.

(1) [But where the declaration was for obstructing the waters of
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Place.

Where the local description of property within a parish is material, it is sufficient to prove it to be a parish by general reputation, having churchwardens and overseers belonging to it, although it be in fact but a hamlet (*q*).

And where premises are described to be situated in a particular parish, it is sufficient to prove that the parish is usually known by the name of description (*r*).

And proof that the parish is usually described by the name of a saint, or by any other addition, which is omitted in the pleadings, will not be material (*s*).

In ejectment, the premises were alleged to be situate at Farnham, but were proved to be situate at Farnham Royal, and it was held to be sufficient, as it was not shown that there were two Farnhams (*t*).

* 1576 So where the penalty in a conviction was adjudicated to the poor of the parish of St. Mary, Lambeth, but the offence was proved to have been committed in the parish of Lambeth, it was held to be sufficient, there being no evidence to show that there were two * parishes of that name (*i*). And although there be two parishes of the general name, the general description will be sufficient (*u*).

But where, in trespass for breaking and entering a house situate in the parish of Clerkenwell, it was proved that there were two parishes in Clerkenwell, the one known by the name of St. John, the other by the name of St. James, but that the whole was generally known by the name of Clerkenwell, the description was held to be insufficient (*x*).

(*q*) 2 Camp. 5, n. See *Kirtland v. Pounsett*, 1 Taunt. 570; *supra*, 1127.

(*r*) *Kirtland v. Pounsett*, 1 Taunt. 570. *Goodtitle v. Walter*, 4 Taunt. 671.

(*s*) In *Goodtitle v. Walter*, 4 Taunt. 671, the Court said that the case in which the variance between the parish of Chelsea and the parish of St. Luke, Chelsea, had been held to be fatal, had been overruled by the case of *Kirtland v. Pounsett*, 1 Taunt. 570.

(*t*) *Doe v. Salter*, 13 East, 9.

(*i*) *R. v. Glossop*, 4 B. & A. 616. And note, that Lord Ellenborough said that the variance would not be material in ejectment.

(*u*) *Doe d. James v. Harris*, 5 M. & S. 326. For the description is correct, as far as it goes; there is no variance, although the two parishes are usually distinguished by an addition.

(*x*) *Taylor v. Hooman*, 1 Moore, 161. *Tamen qu.* The plaintiff was nonsuited; and a new trial was moved for, on an affidavit stating that the whole district was generally known by the name

D. creek, and the evidence was of obstructions in the waters near the mouth of D. creek, the variance was held to be fatal. *Funk v. Arnold*. 3 Yeates. 428.

And where, in an action for an excessive distress, the premises were laid to be in the parish of St. George the Martyr, Bloomsbury, and were proved to be in the parish of St. George, Bloomsbury, it was held that the description was improper (y).

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IV.

Place.

Where the premises in ejectment were described as situated in the united parishes of St. Giles in the Fields, and St. George, Bloomsbury, and it appeared that the premises were in fact situated in the parish of St. George, Bloomsbury, and that the parishes were united by act of parliament for maintaining their * poor, but for no other purpose, the variance was held to be fatal (z). * 1577

Where the premises in ejectment were alleged to be situate in the parish of West Putworth and Bradworthy, and it was proved that part were in the parish of West Putworth, and part in the parish of Bradworthy, it was held to be sufficient; and that the declaration was to be construed as alleging the premises to be so situated (a).

In an action for non-residence, the description of the parish of St. Ethelburgh for St. Ethelburgha, is fatal (b).

An allegation that *A. B.* was a constable of the parish of St. Paul, Covent Garden is not satisfied by evidence that he was presented as a fit person to serve as constable for that parish, but sworn in to serve for Westminster generally (c).

As natural persons, as well as aggregate corporate bo- Name.

of St. James, Clerkenwell, and statutes were referred to in which it was so described. Gibbs, C. J. observed that the acts referred to were not part of the public statutes; but the Court gave leave to amend, on payment of costs, by adding another count.

(y) *Harris v. Cooke*, 2 Moore, 587. [8 Taunt. 539. S. C.] The Court said that it should have been described by its known and popular name, and not by its general description; St. George, Bloomsbury, was dedicated to King George the First, and St. George the Martyr is quite a distinct parish.

Doe d. James v. Harris, 5 M. & S. 326; in that case a fine described the lands as situate in the parish of *Westbury*; there were two parishes of that name, Westbury on Trym, and Westbury on Severn, in the latter of which the premises were situate, and it was held that there was no variance.

(z) *Goodtill d. Pinsent v. Lammiman*, 2 Camp. 274.

(a) *Goodtill d. Bremridge v. Walter*, 4 Taunt. 671. See the case of *Morgan v. Edwards*, 2 Marsh. 96; [6 Taunt. 394, S. C.] *supra*, 1574. In the latter case the evidence varied from the written description in the lease.

(b) *Wilson v. Gilbert*, 2 B. & P. 281. *Supra*, 1290.

(c) *Goodes v. Wheatly*, 1 Camp. 231.

PART dies, must be described by name, an allegation of the
IV. name of any such person or body, whose existence is essen-
 tial to the claim or charge, is necessarily *descriptive*,
Name. and, consequently, a variance is generally fatal. Where,
 however, the name of a party to the action or indictment
 is mistaken, the objection must be taken by plea of the
 misnomer in abatement, and cannot be taken by a plea in
 bar (d).

Where a corporation was sued by the name of the
 Mayor and Burgesses of Stafford, and on production of
 the charter it appeared that they were "The Mayor and
 * 1578 Burgesses of the borough of Stafford, in the county * of
 Stafford," the Court held that the variance was *not* fatal,
 under a plea of not guilty to a declaration in case, but
 that the misnomer might have been pleaded in abate-
 ment (e). But if there be no such corporation the objec-
 tion is available in bar (f).

Upon the trial of an ejectment on the demise of the
 mayor, &c. of the borough town of Maldon, it appeared
 from the charter that they were incorporated by the
 description of the mayor, &c. and *commonalty of Malden*;
 and it was held that the variance was immaterial, the char-
 ter showing that Malden was a borough town (g).

Of persons. The misnomer of persons whose existence is essential to
 the charge or claim is usually a fatal variance.

An indictment charging the prisoner with having per-
 sonated M'Cann, is not satisfied by proving his personation
 of M'Carn (h).

(d) 1 B. & P. 40. [16 Mass. Rep. 146. 147.]

(e) *Mayor and Burgesses of Stafford v. Bolton*, 1 B. & P. 40. In
 an action for stock, the South Sea Company were described as
 trading *ad Maria Austria*, and it was held that the variance was
 fatal; but the plaintiff had leave to amend. *Turvil v. Aynsworth*,
 Str. 787.

(f) *Ibid.* and Bro. Misn. 73.

(g) *Doe v. Miller*, 1 B. & A. 699. And see the cases of the
Dean and Chapter of Carlisle, 10 Co. 124; of the *Dean and Canons*
of Windsor, *Ibid.* *Dr. Ayray's case*, 11 Co. 19; Cro. Eliz. 816. [See
The People v. Runkel, 9 Johns. 147.]

(h) *R. v. Tassett*, Cor. Wood, B. Kent Lent Ass. 1818, and after-
 wards before the Judges. *Tarbart for Tabart* is a fatal variance in
 a bail-piece (*Bingham v. Dickie*, 5 Taunt. 814); so *Shakspear* for
Shakespeare, on a plea in abatement. If a defendant be arrested by
 a wrong Christian name, as *Berend* for *Bernard*, the Court will dis-
 charge him on motion (*Wilks v. Lorck*, 2 Taunt. 399). See also
Smith v. Innes, 4 M. & S. 360. So where a party having two
 Christian names is sued by one only (*Arboun v. Willoughby*,
 1 Marsh. 477). *Secus*, where he has dealt with the party by the

* So Couch for Crouch is a fatal variance, in the description of a party to a bill of exchange (i) (1).

So a misdescription of a name of dignity will be fatal.

The declaration in an action for a malicious prosecution alleged that the defendant went before *R. C. baron Waterpark*, of *Waterfork*, in the county of *A.*; the proof was, that he went before *R. C. baron Waterpark*, of *Waterpark*, in the county of *A.*; and the variance was held to be fatal (*k*).

An allegation that *J. S.*, otherwise *R. S.*, made a deed, is not supported by evidence that *J. S.* made a deed by the name of *R. S.* (*l*).

So a declaration against a party in his right name, alleging that he executed a bond in a different name is bad (*m*).

If the plaintiff allege that a promissory note was made payable to him, or that a promise was made to him, and on proof of the instrument or contract, it appears to have been made to another, it is no variance if the plaintiff show that he was the person really meant, for that is the legal effect (*n*).

Where a person is described by name simply, without addition, proof that there are two persons of that name is no variance, for the allegation is still true.

* Upon an indictment for an assault upon *Elizabeth Edwards*, it appeared that there were two of that name, mother and daughter, and that in fact the assault had been

name by which he is sued (*Walker v. Willoughby*, 6 Taunt. 530; *S. C.* 2 Marsh. 230); or where the name is *idem sonans*, as *Benedetto* for *Beniditto*. *Abibol v. Beniditto*, 2 Taunt. 401.

(i) *Whitwell v. Bennett*, 3 B. & P. 559. So if in an action on the statute of usury a bill of exchange be alleged to be drawn on *John K.* instead of *Abraham K.* *Hutchinson v. Piper*, 4 Taunt. 810.

(k) *Walters v. Mace*, 2 B. & A. 756.

(l) *Hyckman v. Shotbolt*, Dyer, 279. b. pl. 9.

(m) *Gould v. Barnes*, 3 Taunt. 504.

(n) *Willis v. Barrett*, 2 Starkie's C. 29. *Moller v. Lambert*, 2 Canap. 548. And see *Bass v. Clive*, 4 M. & S. 13. *Secus*, in the case of a writ. *Scandover v. Warne*, 2 Camp. 270, or specialty.

(1) [Where a declaration recited that *E. Brown* was attached to answer, &c. and then charged the defendant as *Elisha Brown*, on a bill of exchange drawn by him in favor of the plaintiff; a bill of exchange signed *E. Brown*, the handwriting of which was proved to be that of *Eljah Brown*, was held to be inadmissible. *Craig v. Brown*, 1 Peters' Rep. 139.]

PART
IV.Misnomer
of persons.

made upon the daughter; and the conviction was held to be good (o).

But a description of persons by the name by which they are commonly known is usually sufficient.

Proof that certain officers in the town of *A.* within the parish of *B.* have always been called the churchwardens of *A.* is sufficient to warrant the description of them as the churchwardens of *A.* (p).

And proof that the name alleged is the reputed name is usually sufficient.

Where an indictment charged the prisoner with having stolen the property of *Victory* baroness Turkheim, the prosecutrix; and the proof was that her real name was *Selina Victoire*; that baroness Turkheim was her real title, but that she was usually known by the name of baroness Turkheim; the Judges held that the description was sufficient (q) (1).

The misnomer of a party to the proceeding, whether civil or criminal, can usually be taken advantage of by plea in abatement only, and is immaterial where the defendant pleads in bar.

And where a defendant in assumpsit has let judgment go by default, the other defendants cannot take advantage of a misnomer of that defendant, proof being given that he has been served with process (r).

- * 1581 Where the defence to an action by *Elizabeth H.* * was, a judgment against the defendant, as garnishee, in the mayor's court, in an action against the present plaintiff, in which she was called *Eliza H.* satisfaction having been entered, it was held that the variance was not material, proof having been given that she was known by the name of *Eliza*, as well as by that of *Elizabeth* (s).

(o) *Rex v. Peace*, 3 B. & A. 579. But if father and son be both called *A. B.* by *A. B.* simply, the father shall be intended. *Lepiot v. Browne*, 1 Salk. 7. *Wilson v. Stubs*, Hob. 330. *Sweeting v. Fowler*, 1 Starkie's C. 106. *Supra*, 239.

(p) *Stead v. Heaton*, 4 T. R. 669.

(q) *Sull's case*, Leach, 1005. See also *Mary Graham's case*, Leach, 619.

(r) *Dickenson v. Bowes*, 16 East, 110.

(s) *Huzham v. Smith*, 2 Camp. 19.

(1) [Where an indictment for stealing a horse laid it to be the property of Stephen *Harris*, and it appeared that the owner's name was *Harrison*, but that he was sometimes called *Harris*; this was held sufficient to support the indictment. *The State v. France*, 1 Overton's Rep. 434.]

If plaintiffs describe themselves as the assignees of *A*, proof that they are assignees under a joint commission against *A*. and *B*. is no variance (*t*).

PART
IV

To satisfy an allegation that a party did a particular act, it is sufficient to prove that the act is his in legal effect.

Character.
Act.

In an action of debt against *B*. alone, on a joint bond of *A*. and *B*. where *B*. pleads payment, proof that *A*. paid the debt will support the issue (*u*).

Debt on bond against the executors of *Stalwood*; plea that *Hicks* was a co-obligor, and that on a day specified *Hicks* and *Stalwood* paid the money; it was held that this was proved by evidence that *Stalwood* paid one half during his life, and *Hicks* the remainder after his death (*x*).

In an action on the case against the master of a ship for loss of goods, it was alleged that the plaintiff was to pay the defendant, but the Jury found that the plaintiff was to pay the ship-owners, and that the latter were to pay the defendant; and the Court held that the allegation was supported, since the plaintiff did in effect pay the defendant (*y*).

In an action by the consignor of goods against the * carrier, on an undertaking to carry them for a certain hire and reward, to be paid by the plaintiffs, proof of an agreement, as between the consignor and consignee, that the latter shall pay the carriage, does not disprove the allegation, the consignor being in point of law liable to the defendant (*z*).

* 1582
Parties.

An allegation, in an action on an indemnity bond, that *A*. and *B*. (the parties indemnified) advanced certain money to *D*., is satisfied by proof of the advance of the money by *A*. *B*. and *C*., the latter being a dormant partner (*a*).

Where the fact alone is material, and the agent immaterial, a variance as to the latter will not be fatal. If a declaration on a bill of exchange aver a presentment

(*t*) *Harvey & others v. Morgan*, 2 Starkie's C. 17. Vide *supra*, 1491, 2. and tit. *Bankruptcy*.

(*u*) P. C. Rep. Temp. Hardw. 133.

(*x*) *Groves v. the Executors of Stalwood*, Rep. Temp. Hardw. 133.

(*y*) *Morae v. Slue*, 1 Ventr. 190. 238.

(*z*) *Moore v. Wilson*, 1 T. R. 659. And see *Davis v. James*, 5 Burr. 2680. *Vale v. Bayle*, Cowp. 294.

(*a*) *Harrison v. Fitzhenry*, 3 Esp. C. 238.

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IV.Act.
Parties.

by *A. B.* it is sufficient to prove a settlement by another (*b*).

In all civil cases, and in prosecutions for misdemeanors, it is a general rule, that an allegation that a party did an act is sustained by evidence that he caused it to be done by another, according to the well-known maxim, *qui facit per alium facit per se* (1).

In an action against *A.* for damage occasioned by his negligence in driving a carriage, it is sufficient to prove that the damage was occasioned by the negligence of his servant (*c*).

An averment that the defendants accepted a bill of * 1593 * exchange is satisfied by evidence of an acceptance by their authorized agent (*d*).

But an allegation that the plaintiff employed *A.* to repair damage to a house, and to alter a room, is not supported by evidence that an insurance company employed *A.* to repair, and that the plaintiff employed him to alter the room (*e*).

An allegation, that *A.* sold a chattel to *B.* by writing, is not proved by evidence that *B.* was the purchaser at an auction, and that *A.*'s agent wrote *B.*'s name, as the buyer, in the printed catalogue, and that *B.* gave his promissory note for the sum (*f*).

(*b*) *Boehm v. Campbell*, 1 Gow, 55.

(*c*) *Brucker v. Fromont*, 6 T. R. 659. If *A.* and *B.* being carriers, horse a cart each for his own share of the road, they are jointly liable for the negligence of the servant of either. *Waland v. Elkins*, 1 Starkie's C. 272. But as to allegations that the principal has subscribed an instrument, which has in fact been subscribed by an agent, see *Levy v. Wilson*, 5 Esp. C. 180. *Helmley v. Loader*, 2 Camp. 450, *supra*, 228.

(*d*) *Heys v. Heseltine*, 2 Camp. 604. See *Coare v. Gible*, 4 Esp. C. 231.

(*e*) *Witherington v. Buckland*, Rep. Temp. Hardw. 309.

(*f*) *Symonds v. Ball*, 8 T. R. 151.

(1) [In an action against two or more persons on a promissory note, with a joint name or firm, if the declaration contain no averment that the defendants were partners, or acted under the firm, but that the defendants made the note, their own proper hands and names being thereto subscribed; proof that one of the defendants subscribed the note with the joint name or firm, will not support the contract as laid. *Pease & al. v. Morgan*, 7 Johns. 468. Where the declaration stated that the defendants, by a certain writing under their hands, &c. promised to pay, and a note signed for the defendants by their attorney was produced in evidence, it was held that there was not a variance. *Phelps v. Riley & al.* 3 Conn. Rep. 266.]

An averment of an agreement to deliver goods to *A.* is not proved by evidence of an agreement to deliver goods to the bearer of a receipt for the goods given by the defendant (*g*).

PART
IV.

Where the consideration was alleged to be the releasing of certain goods distrained for rent to the plaintiff's tenant, and evidence was given of a promise on consideration of returning the goods to the defendant, the variance was held to be fatal (*h*).

Act.
Parties.

In an action for an amercement in a court-leet, an allegation that the court was held before the steward is not proved by evidence that it was held before his deputy (*i*).

An averment of an absolute assignment, alleged as * a * 1584 consideration for a promise, is not supported by proof of a qualified assignment (*k*).

Where a wrongful act, and an injurious consequence are alleged, the consequence must be shown to result immediately from the act; it is not sufficient to connect the act with a remote consequence, by evidence of intermediate causes. Consequence.

Where the plaintiff alleged that the defendant placed and continued a heap of earth, by means of which the refuse-water was prevented from flowing from the plaintiff's house to a certain ditch, and the proof was that the earth had been so placed originally, as not to obstruct the water, but that in process of time the earth was trodden down, and fell into the ditch, and obstructed it, it was held to be a variance (*l*).

An allegation that the defendant diverted and turned a stream of water is not proved by evidence that by interrupting its course and penning it back he caused it to overflow the plaintiff's premises (*m*).

An allegation of damage from the unskilful steerage of

(*g*) *Samuel v. Darch & others*, 2 Starkie's C. 60.

(*h*) *Leery v. Goodson*, 4 T. R. 687.

(*i*) *Wyvill v. Shepherd*, 1 H. B. 162. For *semble*, a deputy cannot be appointed without special authority, under a particular grant, or by established usage. See 4 Inst. 88. And see *Gery v. Wheatly*, 1 H. B. 163. n.

(*k*) *Vansandau v. Burt*, 1 Moore, 42.

(*l*) *Fitzsimons v. Ingdis*, 5 Taunt. 534. Case, for so negligently pulling down a party wall that plaintiff's cellar was weakened and fell in, and his wine was destroyed; the proof was, that the injury was caused by the defendant's placing a quantity of bricks in pulling down the wall on the cellar, *per quod*, &c. and the variance was held to be immaterial. *King v. Williamson*.

(*m*) *Griffiths v. Marson*, 6 Price, 1.

- PART IV.** the defendant's ship is not satisfied by evidence of damage from the improper stowing of the defendant's anchor (*n*).
- Act.** If the declaration allege a special damage, that the plaintiff gave bail to the sheriff at the return of the writ, it is not proved by evidence that he paid the debt, and 10*l*. for costs, into the hands of the sheriff (*o*).
- Agent.** A variance as to the number of agents seems to be immaterial, unless the number, from the nature * of the case, operate by way of description of the charge or claim.
- * 1585 If *A.* be indicted as accessory to *B. & C.* he may be convicted on proof that he was accessory to a felony committed by *B.* alone, or by *B. & C.* together with *D.* (*p*).
- Number of parties.** An allegation in perjury, that the oath was taken before *E. W.* one of the justices of assize, is proved by evidence that it was taken before *E. W.* and another justice of assize (*q*).
- In general, in actions for torts, it is sufficient if the injury be proved to have been committed by one only of the defendants, who may be convicted, and the rest acquitted (*r*).
- Where three promise to do an act upon request, a request to one is a request to all (*s*).
- Where it was alleged that differences depended between six persons, partners, and it appeared that three of the partners had given a joint and several bond to the other three, conditioned for the performance of the award, and that the latter had given a similar bond to the former, in which it was recited that differences existed between the above bounden three and the above named three, it was held to be no variance (*t*).
- An allegation in an indictment of perjury, that *A.* filed his bill (upon the answer to which perjury is assigned) against *B.* and another, is satisfied by proof of a bill filed against *B. C.* and *D.*, the perjury being assigned on a fact which is material, as between *A.* * and *B.* only, and it seems that it would have been sufficient to allege that it was filed against *B.* only (*u*).
- * 1586

(*n*) *Hullman v. Bennett*, 5 Esp. C. 226.

(*o*) *Bristow v. Haywood*, 4 Camp. 213.

(*p*) *Stark. Crim. Pleadings*, 141, 2.

(*q*) *Rex v. Alford*, Leach's C. C. L. 179.

(*r*) *Supra*, 1065.

(*s*) *Breerton's case*, Noy, 135; Vin. Ab. T. b. 97; and *vide supra*, 1394 287, (*h*).

(*t*) *Winter v. White*, 3 Moore, 674.

(*u*) *Rex v. Benson*, 2 Camp. 508, Cor. Ld. Ellenborough.

If the act itself, which is the foundation of the claim or charge, be proved, it seems that allegations as to the manner of doing it, laid by way of aggravation, may be rejected. Thus upon a charge of murder the act is laid to have been done *wilfully*, and of *malice aforethought*, yet although neither of these allegations be proved, the prisoner may be convicted of manslaughter (x).

PART
IV.

Allegation of
motives and
intention.

So if a libel be alleged to have been published with intent to bring the administration of justice into contempt, and also to defame particular magistrates, the defendant is liable to be convicted, if a publication with either of those intentions be proved against him (y).

Upon an indictment charging the defendant with assaulting a female child, with intent to abuse and carnally to know her, he may be convicted of the assault with intent to abuse her, although the Jury negative the rest of the intention (z).

If slanderous words be alleged to have been spoken with intent to injure the plaintiff in two trades, it is not a fatal variance if it turn out that the intent was to slander him in one of them only (a).

Variances in the proof of a written instrument may be considered, 1st, Where it is set out by the *tenor*, &c.; 2dly, Where it is described in *substance* and *effect*; 3dly, Where it is vouched in proof of particular facts by a description of its date, names of parties, &c.; 4thly, Where a fact is simply alleged, without * vouching the instrument, and the instrument is used but as evidence. * 1587

Written
instrument.

In general, where a party is bound, either by the nature of the case, or by his own allegation, to strict proof of a written document, any variance which affects the sense will be fatal (1); but a mere variance in the spelling of a word will not be material unless the word be thereby altered into one of a different meaning (b).

(x) 2 Hale, 246; Fost. 329.

(y) *Rex v. Evans*, Cor. Bayley, J. Lanc. Sp. Ass. 1821.

(z) *Rex v. Dawson*, Cor. Holroyd, J. York Summer Ass. 1821.

(a) *Figgins v. Cogswell*, 3 M. & S. 369.

(b) *Supra*, tit. *Forgery*.—*Libel*. Stark. Crim. Pleadings, 100, 2d

(1) [In an action of debt on a decree in chancery for "860l. 12s. 1d. with interest from a certain day to the day of passing the decree," if the declaration be only for the principal without the interest, the variance is fatal. *Thompson v. Jameson*, 1 Cranch, 283. See also *Dyer & al. v. Stevens*, 6 Mass. Rep. 389. *Smith v. Drew*, 5 ib. 514.]

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instrument.

The words "to the tenor following," or "as follows, or "in the words and figures following," bind to an exact recital (c).

Under such an allegation, the insertion of the word *nee* instead of *non* (d), *air* for *heir* (e), would be fatal; but a variance of the word *abby* for *abbey* (f), or in an indictment for perjury, of *undertood* and *believed* for *understood* and *believed* (g), would not be material.

A variance in a name contained in an instrument so set out, or in a record on a plea of *nul tiel record*, will be fatal, as of *Crawley* for *Crowley* (h), *Ansty* for *Anstey*, *Sharless* for *Sharpless* (i), *Shutliff* for *Shirliff* (k), unless, as it seems, the name be *idem sonans*, as *Segrave* for *Seagrave* (l).

* 1588 * And so it is where a name is alleged which is to be proved by a record, or other written instrument (m).

An allegation that it was presented in an indictment, in *manner and form* following, does not bind to an exact proof; and therefore, where the indictment set out under that allegation omitted the word *despaired*, it was held that the variance was not material (n). •

Oyer of condi-
tion of bond.

If the condition of a bond be set out on oyer, a variance from the tenor will be fatal. Thus, where on oyer, the condition was, that if the defendant should pay to the

edit. Doug. 194; Cowp. 230; 2 Salk. 660. [See *The State v. Carter*, Cam. & Nor. 210. *The State v. Farnor*, 1 Hawks, 487. *Douglas & al. v. Beam & al.*, 2 Binney, 76.]

(c) Doug. 97. *Rex v. Powell*, 2 Bl. R. 788; 2 Salk. 660; Hob. 272; 8 Co. 78; Co. Ent. 508; Dyer, 75. *Lady Ratcliff v. Shubley*, Cro. Eliz. 224. *Blisset v. Johnson*, Cro. Eliz. 503; 2 Roll. Abr. 708; *supra*, tit. *Libel*, [*The State v. Coffey*, 2 Taylor, 272. Vol. II, 858. note (1).]

(d) 2 Salk. 660.

(e) 1 Str. 201. 231.

(f) Ibid.

(g) *Rex v. Beach*, Cowp. 229.

(h) 12 Ass. pl. 2.

(i) Bro. Var. 20.

(k) *Gordon v. Austin*, 4 T. R. 611. See also *R. v. Shakespeare*, 10 East, 83.

(l) 2 Str. 889.

(m) *Turvil v. Agneworth*, Str. 787. The plaintiff declared for stock in the company trading ad *Maria Austral*, vocat, the South Sea Company; and after great debate it was held that the variance between *Austral* and *Austral* was fatal, but the plaintiff had leave to amend.

(n) *Rex v. May*, Doug. 193.

plaintiff the full sum of 100*l.* by six equal payments, &c. and under the plea of *non est factum* the evidence was, that the word *hundred* had been omitted in the bond, and had been interlined in it after execution, the variance was held to be fatal, although it was clear, from the context, that the word hundred was intended (*o*) (3).

If a public statute be misrecited, the Courts will take notice of the variance, and it will be fatal (*p*); but they will not notice a variance in a private statute unless it be pleaded (*q*).

Where in setting out a statute the word *or* is used * instead of the word *and*, the mistake will be fatal (*r*), * 1589 unless the word *or* in the statute has always been construed to mean *and* (*s*).

Secondly, when the instrument is described merely by its substance and effect, it is sufficient to prove it by one which corresponds in *legal effect* (1).

(*o*) *Waugh v. Bussell*, 5 Taunt. 707. [1 Marsh. 214. 311. S. C.] *Secus*, where the substance only is alleged and oyer is not demanded. *Ib.* And Gibbs, C. J. observed, that C. B. Comyns, in 5 Com. Dig. Obligation B. 4. had misunderstood the case *Cull & ux. v. Sarmine*, when he says, that if the declaration be upon a bill, that he will pay, and the bill says "if he pay" the variance will not be material, and that what was really decided in that case was, that the mis-spelling, by adding an e final to the name of the widow Sarmine, did not thereby vitiate the obligation.

(*p*) *Boyce v. Whitaker*, Doug. 97.

(*q*) *Rex v. Wilde*, 1 Lev. 296; Doug. 97; 1 Lord Ray. 382. [Yelv. 127. a. note (1).]

(*r*) *King v. Marsack*, 6 T. R. 771. See the *Attorney General v. Horton*, 4 Price, 237, where *thereout* for *thereon* was held to be an immaterial variance.

(*s*) *Ibid.*

(3) [Where in the oyer, the words were "or delay," and in the declaration "or other delay," the variance was held immaterial. *Henry v. Brown*, 19 Johns. 49. A variance between the date of a bond set forth in the declaration, and that produced on oyer, is fatal. *Cooke v. Graham's Adm'or*, 3 Cranch, 229. After oyer, and pleas of performance and payment, to an administration bond, and verdict, it is too late to object a variance between the bond and the form prescribed by statute. *Carl v. Commonwealth*, 9 Serg. & Rawle, 63. See also *James v. Walruth*, 8 Johns. 410.]

(1) [In a suit against the assignor of a bond, it is no variance that the assignment set out in the declaration is stated to be *for value received*, though these last words are wanting in the assignment itself; for these words in the declaration are only an averment of the plaintiff that such was the consideration for which the assignment was made, and not an averment that the assignment was so written. *M^r Williams v. Smith*, 1 Call, 123. Vide *Saxton & al. v.*

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In debt on bond, the plaintiff alleged that the defendant acknowledged himself to be bound to *Richard Bishop*; on oyer it appeared that the defendant acknowledged himself to be bound to *Richard* ——— to be paid to the said *Richard Bishop*; and on demurrer the Court held that this was no variance, for the word *said* pointed out the relation of the names so immediately, that it was impossible to doubt but that the bond was made to the person to whom the money was payable (t) (2).

The declaration averred that a note was payable to *B.* or order, and alleged an indorsement as payable to *C.* or order, and on production of the note the indorsement was, pray
* 1590 pay to *C.*, it was held that there was * no variance in substance, for by the indorsement it was payable as alleged (u).

So where the declaration alleged a bond for 40*l.* to be paid to the plaintiff, and on oyer of the bond it was to be paid to his attorney or assigns, the Court, on demurrer, held the variance to be immaterial, for payment to the plaintiff or his attorney was the same thing; the *teneri*

(t) *Bishop v. Morgan*, 11 Mod. 275. See also *Waugh v. Butsell*, [1 Marsh. 214. 311.] 5 Taunt. 707. In an action on the case for detaining a bond alleged to have been given by Lord *Gage*, upon *non assumpsit* pleaded, a bond was given in evidence executed by Lord *Gage*; and the Court of C. B. held that the variance was not material. *Alcorn v. Westbrook*, 1 Wils. 115; but it seems from the report, that although the declaration alleged the name to be *Gave*, yet in other parts it was stated to be *Gage*. If in setting forth the substance and effect, a blank be supplied, and a meaning be thereby added, which is not actually supplied by any terms contained in the instrument itself, the variance will be fatal. An indictment for perjury alleged that the defendant swore in substance and effect, "that *A.* assaulted her, and at the same time threatened to shoot her," the word *time* was omitted in the affidavit, and the variance was held to be fatal. *R. v. Mary Ann Taylor*, 1 Camp. 404.

(u) B. N. P. 275.

Johnson, 10 Johns. 418, (cited *Supra*, Vol. II. 84, note (1),) where the words "for value received," in declaring on a promissory note, were held to be *descriptive* of the contract.]

(2) [On a single bill for a sum of money payable with interest, if the declaration do not demand the interest in terms, but only damages for non-payment, yet if it describe the specialty correctly as bearing interest, there is no variance. *Hammitt v. Bullitt's Exors.* 1 Call, 567. So where the declaration described the bond as payable on or before the 1st day of April ensuing the date, with interest thereon from the 1st day of January next ensuing the same date; and the bond was "payable with interest from the 1st day of January on the first day of April next," it was held that there was no variance, *ibid.*]

made it a debt to the plaintiff, and a *solvend.* to any one else would be repugnant (x) (1).

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In an action by the husband alone, on a bond alleged to be given to him, he gave evidence of a bond to himself and his wife; and this was held to be no variance, for he had a right to reject the obligation to his wife, and in legal import it was a bond to himself (y).

Written
instrument.
Legal effect.

So where in covenant, a lease was alleged to have been made by the plaintiff on the one part, and the defendant on the other, and the lease proved under the plea of *non est factum*, was by the plaintiff and his wife of lands the property of the wife before marriage (z).

In an action against the high bailiff of Westminster for a false return to a writ of *fi. fa.* the plaintiff alleged a warrant to levy 200*l.* of the goods of *A. U.*, which the plaintiff had recovered against *A. U.* He proved a *feri facias* to that effect, and a warrant to levy 200*l.* of the goods and chattels of *A. U.*, which the plaintiff had recovered against —; and it was held that the allegation was satisfied, for the name might be supplied by reference (a) (2).

* A declaration for maliciously holding to bail, in setting out the judgment in the former action, stated, “it was thereupon considered that the then plaintiffs should take nothing by their said writ, but that they and their pledges to prosecute should be in mercy, &c.” In the record of the former judgment, the words “and their pledges to pro-

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(x) 2 Salk. 659.

(y) *Ankerstein v. Clarke & others*, 4 T. R. 616. Although the bond was given to the wife as administratrix. *Ibid.*

(z) *Arnold v. Revault*, 1 B. & B. 443; 4 Moore, 66. *Beaver v. Lane*, 2 Mod. 217. [Dalis. 84. pl. 37.]

(a) *King v. Morris*, 2 Str. 909; Fitzg. 198; 1 Ford, 85. See also *Hendray v. Spencer*, cited 1 T. R. 239. *Supra*, 1336.

(1) [A declaration on a bond was in the name of A. B.—The bond offered in evidence was payable to A. B. “en account of Messrs G. & P. merchants in Glasgow.”—Held to be an immaterial variance. *Peter v. Cocke's Ex'or*. 1 Wash. 257. If a declaration state that in a dispute between the defendant and the plaintiff, executor of A., a sum of money was awarded to the plaintiff; and the award, exhibited on oyer, be of the same sum to the plaintiff, and P. executors of A.—this is no variance. *Macon v. Crump*, 1 Call, 582.]

(2) [Where in debt for an escape, the declaration set forth the *ca. sa.* with the usual words “And him safely keep,” and the *ca. sa.* produced in evidence omitted the word “keep,” it was held not to be a fatal variance. *Jones v. Cook*, 1 Cowen, 309.]

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secute," were omitted, and it was held that the words might be rejected as surplusage (b).

A declaration in setting out the condition of a bail-bond stated, that if the defendant should appear to answer the plaintiff, *according to the custom of his Majesty's court of Common Bench*, then the obligation should be void; on the production of the bond, it appeared that the words in *Italics* were omitted, but this was held to be no variance, as the legal effect was averred (c).

An avowry alleged certain rent to be due under a demise, and certain further increased rent for breaking up land into tillage. It appeared from the lease that the increase of rent was confined to the last three years, and the rent was, in fact, claimed in respect of part of the last three years, and the Court held that under the statute (d) this was no variance, the mere effect and operation of the demise being stated (e) (1).

In an action for false imprisonment, the declaration, in setting forth the bill of Middlesex, alleged that the sheriff was commanded to take *A. B.* (the then defendant) and *John Doe*, if, &c. and them, &c. The bill * produced was in words at length, and it was held to be no variance, for it was sufficient to set out the substance; and there

(b) *Judge v. Morgan*, 13 East, 547. Although the judgment was pleaded with a *prout patet*. Note, that Lord Ellenborough observed that there was an &c. in the record. See *Phillips v. Shaw*, 4 B. & A. 435; 5 B. & A. 984; *infra*, 1599.

(c) *Bonsfellow v. Steward*, 3 Moore, 214. Declaration states the condition of a replevin-bond to prosecute an action for taking, &c. his *goods and chattels* in the said condition mentioned, the condition is to prosecute for taking, &c. goods and chattels, and *growing crops*, and held to be no variance, for growing crops may be considered as chattels within the st. 11 G. 2, c. 19.; *Glover v. Coles*, 1 Bing. 6.

Allegation of covenant to pay, &c. in twelve months, is proved by a covenant to pay in twelve *calendar* months; but (*semble*) it appeared from other parts of the record that calendar months were meant, *Cockell v. Gray*, 3 B. & B. 186.

(d) 11 Geo. II. c. 19.

(e) *Roulston v. Clarke*, 2 H. B. 563.

(1) [Where a declaration alleged that slanderous words were spoken of and concerning the testimony given by the plaintiff, on a complaint made by him before a magistrate on the 20th of March, and the proof was that the complaint was made on the 8th of March, the variance was held to be immaterial—the declaration not professing to set out the complaint according to its tenor, or in *hæc verba*. *M. Kinly v. Rob*, 20 Johns. 351.]

was no variance between what was set out and the bill of Middlesex produced (*f*).

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IV.

Where in proceeding against bail above, and *nul tiel record* pleaded to a replication, which alleged a *capias ad satisfaciendum*, returnable *Coram Rege apud Westm. a ca. sa.* was produced, returnable *Coram Rege ubicunque, &c.* it was held to be no variance (*g*) (1).

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instrument.
Legal effect.

In an action against the sheriff for misconduct in the sale of the plaintiff's goods, under a *feri facias*, the plaintiff in stating the substance of the writ, alleged that the sheriff was commanded to levy 80s. awarded to *J. C.* for his damages sustained by occasion of the detaining of the debt; and the writ stated that the 80s. were awarded to *J. C.* for his damages sustained, as well by reason of the detaining the debt, as for his damages; and it was held to be no variance, for costs, in a legal sense, are included in the word damages (*h*). (2)

Where in an action for bribery, the declaration alleged a precept to the mayor, and the plaintiff gave in evidence a precept directed to the mayor and burgesses, the vari-

(*f*) *Wilson v. Mausson*, Cor. Lee, C. J. cited 1 T. R. 237.

(*g*) *Roberts v. Price*, 1 Ld. Raym. 702. And see *Shuttleworth v. Pilkington*, 2 Str. 1155, cited by Buller, J. 1 T. R. 240; where it was held that the omission of *ubicunque* in a bail-bond was not material; for that by appearing before the King was meant the appearing before the King in his Court, and not in person.

(*h*) *Phillips v. Bacon*, 9 East, 298.

(1) [In an action against a sheriff for the escape of a prisoner in his custody in execution, the declaration alleged a judgment recovered in the court of common pleas, of a certain term held at *Salem* in the county of *W. &c.* and in the record of the judgment produced at the trial, the place, where the court was held, was not mentioned; it was held that the variance was immaterial. *Page v. Woods*, 9 Johns. 82. In debt on recognizance of bail, the declaration laid the venue in *Greene* county, and stated that *S. F.* came into the Supreme Court, and by the name of *S. F. of K. in said county*, became bail, &c. and the bail-piece offered in evidence was written *Delaware ss. J. H. is delivered to bail to S. F. of the town of K. in said county*, and was taken before a judge of *Delaware* common pleas, and the recognizance roll stated that *S. F. of the town of K. and county of D.* came into court and became bail. It was held that there was no material variance; the description in the declaration being set out according to the sense, and not according to the tenor. *Rodman v. Forman*, 8 Johns. 26.]

(2) [In an action for an escape, the plaintiff stated the substance of the execution in his declaration, without setting it out in *hæc verba*, but in the execution produced in evidence, there was a variance of one cent in the amount of damages and costs: It was held to be immaterial. *Bissell v. Kip*, 5 Johns. 89.]

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ance was held to be immaterial (i); for the substance was proved, and the mayor being the proper returning officer, the precept should have been directed to him,

So where the declaration alleged a precept to the * mayor, and proof was given of a precept directed to the mayor and commonalty (l).

So where the precept was alleged to be directed to the bailiffs and jurats of Seaford, and the evidence was of a writ directed to the bailiff and jurats of Seaford (m).

In an indictment for perjury, it was alleged that a bill in chancery was directed to *Robert Lord Henley, &c.*; it appeared in evidence to be directed to Sir *Robert Henley, Knight*, but the objection was overruled (n).

Where a declaration for penalties under the stat. 55 Geo. III. c. 137. s. 6. alleged that the defendant was overseer of the township of *S. duly appointed*, and the appointment produced purported to be an appointment of the defendant as overseer of the *parish* of *S.* and it was proved that the township of *S.* and all the other townships within the parish of *S.* maintained their own poor separately, and there was no evidence that any overseer had ever been appointed for the parish of *S.*, and that the defendant had acted as the overseer of the township of *S.*; it was held that it might be presumed that the word parish had been inserted by mistake (o).

An allegation that *A.* was bound by a deed is satisfied under the plea of *non est factum*, by evidence of a joint deed by *A. & B.* (p), whether the deed be joint, or joint and several, for it is still the deed of *A.* (q).

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* If the substance and effect of an instrument be alleged with more particularity than is contained in the instrument, the variance will be immaterial, provided the particulars be true in fact. An allegation that a writ was directed to *A.* and *B.* sheriff of Middlesex, is satisfied by evidence of a writ directed generally to the sheriff of Mid-

(i) *Cuming v. Sibley*, cited 1 T. R. 239.

(l) *Dickson v. Fisher*, 4 Burr. 2267. Note, that the word *commonalty* in the precept had been struck through with a pen, but not obliterated.

(m) *Warre v. Harbin*, 2 H. B. 113.

(n) *R. v. Lookup*, Trin. 7 Geo. III. cited 1 T. R. 240.

(o) *Steel v. Smith*, 1 B. & A. 94.

(p) *Supra*, 477. *Middleton v. Sandford*, 4 Camp. 36.

(q) *Ibid.* But a memorial under the Annuity Act, stating that *A.* and *B.* were severally bound, is bad, if they were bound jointly as well as severally. *Willey v. Cawthorne*, 1 East, 398.

dlesex, coupled with evidence that *A.* and *B.* were the sheriff (*r*).

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Where a written instrument is described merely by the substance and effect, superfluous and insensible words occurring in the description may be rejected as surplusage. Thus, where in a declaration for bribery in setting forth the precept from the sheriff to the portreeve of a borough, it was alleged, "and *if* the said election so made should certify, &c.," it was held that the word *if*, which was not in the precept itself, might be rejected as surplusage, as the precept was not described by its tenor (*s*).

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instrument.
Legal effect.

So where a word in the declaration has been mis-spelt, and the mistake, and the word really intended, plainly appear from the context, the variance will not be material. As where a lease granted liberty to make levels, pits, and soughs, and the declaration in covenant stated it to be a liberty to make *sloughs* (*t*) (1).

But in general a description of an instrument, or an averment to be proved by an instrument, contrary to its legal effect, will be fatal (*u*); as, if the plaintiff declare on a lease by *A.* and *B.*, and the proof be that *A.* being a tenant for life, remainder to *B.* in fee, they both joined in a lease to the plaintiff (*x*): for during * the life of *A.* it is the lease of *A.* and the confirmation of * 1595 *B.*, and after the death of *A.* it is the lease of *B.* and the confirmation of *A.* (2).

Variance from
Legal effect.

(*r*) *Batchellor v. Salmon*, 2 Camp. 525.

(*s*) *King v. Pippet*, 1 T. R. 235.

(*t*) *Morgan v. Edwards*, 6 Taunt. 394. [2 Marsh. 96. S. C.]

(*u*) See *Scandover v. Warne*, 2 Camp. 270.

(*x*) *Treport's case*, 6 Co. 15.

(1) [So, in *Ferguson v. Harwood*, 7 Cranch, 408, where the declaration, by a mere slip of the pen, contained the name of the defendant instead of that of the plaintiff, in the statement of a written agreement which contained the plaintiff's name, and thus made a repugnancy in the contract set forth; it was held, that as the same error, if it had been in the written contract, must have been rejected as nonsensical or repugnant, or the contract have had imposed on it the same sense as if it had been written correctly—a different result ought not to take place, where the repugnancy was only in the declaration, and the context manifestly showed the parties' meaning. The variance was therefore considered by the court as immaterial.]

(2) [In an indictment, on the 7th and 9th sections of the act of Congress (July 29th, 1813, ch. 34) granting a bounty to vessels employed in the cod fisheries, for making a false declaration—the in-

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IV.

Written
instrument.
Variance from
Legal effect.

So if a party make a deed granting rent, which under the circumstances operates as a covenant to stand seized, if it be pleaded as a grant of rent the variance would be fatal (y) (2).

If in an action of debt, or recognizance of bail, the recognizance be alleged generally, and on *nul tiel record* pleaded it appear to be a recognizance with a condition annexed, the variance would be fatal (z) (3).

Debt on bond conditioned for performance of an award; plea no award; replication setting out an award; rejoinder no such award. If it appear in evidence that a material part of the award has been omitted, the variance will be fatal (a). But it is otherwise if the part omitted be void (b).

So if a covenant be stated as absolute, which is but limited; as, if a covenant for repairing contain an exception of casualties by fire, and be stated without such exception (c).

Where in debt for an amercement, the declaration al-

(y) Carth. 308. See also *Baker v. Lade*, 3 Lev. 291; 2 Will. Saund. 97, b. note (2). *Taylor v. Vale*, Cro. Eliz. 166.

(z) Per Powel, J. *Ward v. Griffith*, 1 Ld. Raym. 83.

(a) *Foreland v. Hornigold*, 1 Ld. Raym. 715.

(b) *Ibid.*

(c) *Brown v. Knill*, 2 B. & B. 395. And see *Tempany v. Burdard*, 4 Camp. 20. *Secus*, where the qualification is no part of the covenant. *Ibid.* And *Elliott v. Blake*, 1 Lev. 68. *Gordon v. Gordon*, 1 Starkie's C. 294. Com. Dig. *Pleader*, C. 97.

An allegation of a grant of an unqualified interest is not proved by evidence of a qualified grant of such interest, as the title of the plaintiff, as a shareholder, permitted. *Earl of Portmore v. Buan*, 1 B. & C. 694; *Adam v. Duncalfe*, 5 Moore, 475.

There can be no variance from the legal effect when the terms of the instrument itself are set out. *Ross v. Parker*, 1 B. & C. 358. Nor in general where the allegation corresponds with the fact, as where an act is truly stated to have been done by the under-sheriff, although, in point of law, it be the act of the sheriff.

dictment having stated the purport of the written paper to be that the vessel was of the burthen of 14 tons and 45-95ths of a ton, whereas the paper produced stated it to be 14 tons and 50-95ths of a ton, the variance was held fatal. *United States v. Lake-man*, 2 Mason's Rep. 229.]

(2) [See *Johnson v. Carter*, cited *Supra*, 1476.]

(3) [If a recognizance be to appear and answer a charge for beating another, *whereof he died*, and the declaration state the recognizance to be to answer a charge for beating another merely, the variance is fatal. *Dillingham v. United States*, Circuit Court, April, 1810. Wharton's Digest, 464.]

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IV.

Written
instrument.
Variance from
Legal effect.
* 1596

leged that the defendant was summoned to serve on the jury of the court-leet and court-baron, but the summons proved was to serve on the jury of the court-leet only, the variance was held to be fatal (d).

An allegation that the plaintiffs by the judgment of * the Court recovered against the bail, with a *prout patet*, is not proved by the production of the recognizance of bail, and the *scire facias* roll containing the entry, "therefore it is considered, that the plaintiffs have their execution there-upon against the bail," for this is an award or judgment of execution, and not a judgment to recover (e).

An allegation of a writ indorsed to levy 600*l.* together with sheriff's poundage, officers fees, and other legal charges and incidental expenses attending the levy, is not (it has been held) proved by a writ indorsed to levy 600*l.* together with sheriff's poundage, officers fees, &c. (f).

An averment that a *clausum fregit* issued out of the common pleas with a *prout patet*, is not proved by the record of an appearance to a *clausum fregit* issued out of Chancery (g).

A bill of exchange alleged to have been drawn at Dublin, to wit, at Westminster, for a specified sum of money, is not proved by evidence of a bill of exchange drawn in Ireland for that sum of money; for English currency differs from Irish, and the bill declared upon must be taken to be a bill drawn in England for English money (h).

An averment of an order for the landing of goods on a quay or wharf is not satisfied by proof of an order to deliver at the king's warehouse, although the warehouse stands upon the quay (i).

An omission to allege that which has no legal operation is immaterial (k); as, if a bill of exchange * be alleged to be drawn for the payment of so much money, and the bill proved to be for the payment of so much money sterling (l). * 1597

(d) *Gery v. Wheatly*, 1 H. B. 163, n.

(e) *Phillipson v. Mangles*, 11 East, 516.

(f) *Stiles v. Rawlins*, 5 Esp. C. 133.

(g) *Myers v. Kent*, 2 N. R. 463, [and Mr. Day's note.]

(h) *Kearney v. King*, 2 B. & A. 301.

(i) *R. v. Cassano*, 5 Esp. C. 231.

(k) *Sanderson v. Judge*, 2 H. B. 509.

(l) *Kearney v. King*, 2 B. & A. 301. *Glossop v. Jacob*, 4 Camp. 227. 1 Starkie's C. 69. So where a memorandum is made on a bill of exchange, or promissory note, which is no part of the bill or note. See *Hardy v. Woodroffe*, 2 Starkie's C. 319. *Butterworth v. Lord Le Despencer*, 3 M. & S. 150.

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instrument.
Variance from
Legal effect.

But a variance in *alleging* the substance and effect of a deed or other instrument will be fatal, although the allegation be not material to the cause of action.

The plaintiff declared in covenant that the defendant demised to him a wharf and *storehouses*, where the word in the deed was *storehouse*, in the singular, and it was held to be a fatal variance, although no breach was assigned on the demise of the storehouse (m).

In the previous case of *Hamborough v. Willkie* (n), where the plaintiff, in declaring on a mortgage-deed, alleged that the defendant bound himself, his *heirs* executors and administrators, and on *non est factum* pleaded, it appeared that the word *heirs* was not in the deed, it was held that the variance was not fatal, inasmuch as the allegation of heirs was purely impertinent, and might have been struck out upon motion. It is difficult, however, to rescue this case from the operation of the rule so often adverted to, that a descriptive averment, though ever so immaterial, is never impertinent. And the authority of this case seems to have been much doubted in the latter case of *Hoar v. Mill* (o).

Writing
vouched by
date, &c.

* 1598

Thirdly, Where an instrument is not alleged by its tenor, but is vouched and referred to by its date, or names, sums, days of payment, or other particulars, * a variance from the precise allegations will be material, for they are descriptive of the instrument itself (1). First, if it be described by the date (p).

Where a judgment was described as in a suit during the reign of the present king, it was held that it was not supported by evidence of a judgment in a preceding reign (q).

So if in debt on a judgment of Hilary Term, on *nul tiel*

(m) *Hoar v. Mill*, 4 M. & S. 470.

(n) 4 M. & S. 474, n.

(o) 4 M. & S. 470. See the observations of Lord Ellenborough, C. J. and Le Blanc, J. *ibid*.

(p) *Baynham v. Matthews*, Fitzg. 130. *Stafford v. Forcer*, Gilb. Cas. 311 ; 10 Mod. 311 ; cited 1 Stra. 22. [*Supra*, 86. 1588.]

(q) *Dickens v. Grenville*, Carth. 158.

(1) [In trover for a promissory note, the declaration alleged it to be for \$180, and the note proved to be in the defendant's possession was for \$360, the variance was held fatal. *Bissel v. Drake*, 19 Johns. 66. If the plaintiff cannot state the precise amount of the note, of which he is dispossessed, he may state that it was of great value, *to wit*, of the value of a certain sum. *Ibid*.]

record pleaded it appear to be a judgment of Easter Term (r).

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So if a declaration on a note payable by instalments mis-state the day on which one of the instalments is payable (s).

Writing
vouched by
date, &c.

But if the date alleged be merely formal, as if it be prefaced by a *videlicet*, and therefore be not descriptive, it may be proved to have been made on another day, and the variance will not be fatal (t).

An allegation of date, according both to the legal and dominical year, is supported by evidence of a deed 30th March 1701 (u).

An admission of the due execution of the deed stated in the declaration does not preclude the defendant from objecting on the score of variance (v).

* So a variance from the *place* at which a deed is dated, * 1599 is also material (x).

Where the trial of a particular fact is not material, a variance from the date will not be material, although it is to be proved by a record, or other written instrument, provided the time be not alleged as descriptive of the record, by means of a *prout patet per recordum*, or otherwise; and therefore, where in an action for a malicious prosecution the plaintiff alleged that he was acquitted on a particular day (y), it was held that the precise day was not material, the substance of the allegation being, that the

(r) *Wells v. Girling*, 3 Moore, 75.

(s) *Ince v. Hay*, Fort. 35.

(t) *Wells v. Girling*, 3 Moore, 75. *Nicholls v. Bamfylde*, cited 1 T. R. 657. And see Hob. 209; 3 Lev. 243. *Phillips v. Shaw*, 4 B. & A. 435; *infra*, note (a). And if the declaration merely state that a promissory note was made on such a day, though it bear date on a different day, the variance will not be fatal. *Coxon v. Lyon*, 2 Camp. 307, n. *Pasmore v. North*, 13 East, 517; *supra*, 241.

(u) *Holman v. Borough*, 2 Salk. 658, 9.

(v) *Goldie v. Shuttleworth*, 1 Camp. 70. But *semble*, it would have been otherwise if the admission had run "as stated in the declaration." *Ibid*.

(x) B. N. P. 170; 2 Salk. 659. Debt on bond *quod cum defensus apud London, &c. concessit se teneri*, on oyer it appeared that the deed was dated at Port St. David's, and the Court held that the dating was local, although the plaintiff might have averred London by way of venue merely under a *videlicet*. But *qu*. whether, if the place be not expressly averred as descriptive of the record, as by the words "bearing date at such a place," the averment of place would not be ascribed to venue. *Vide supra*, 241. 1570.

(y) *Purcell v. Macnamara*, 9 East, 157.

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vouched by
date, &c.

plaintiff was acquitted before the commencement of the action (z). So where in an action on the case for not indemnifying the plaintiff, he alleged that *B.* afterwards, to wit, in Michaelmas term, in such a year, obtained judgment against him, and on the trial, it appeared that the judgment was of a different term, it was held that the variance was not material (a), the time not being alleged with a *prout patet per recordum*.

It is otherwise where the date is material from the nature of the case. The plaintiff, in an action against an attorney, for not proceeding to judgment in due time, alleged under a *videlicet*, that process was sued out Jan. 24, 1785, returnable on Monday next * after fifteen days of St. Hilary. He proved process sued out 24th Jan. 1784; and it was held to be material, because it affected the time of the return, and consequently the time when the defendant ought to have proceeded to judgment (b).

By name.

In debt on a judgment a variance as to the name of any party, his abode or addition, will be fatal on *nul tiel record* pleaded (c).

Where the plaintiff declared in debt on a judgment against *Hamilton Fleming*, esquire, and on *nul tiel record* pleaded produced a judgment against the right honourable *Hamilton Fleming*, Earl of *Wigton*, having privilege of peerage, the variance was held to be fatal (d).

(z) *Ibid.* 9 East, 160. See *R. v. Payne*, there cited; and *Brinley v. Watson*, 2 Bl. R. 1050.

(a) *Phillips v. Shaw*, 4 B. & A. 435; 5 B. & A. 984. *Gadd v. Bennett*, 5 Price, 549; *infra*, 1604. *Rastall v. Straton*, 1 H. B. 49. A lease to commence from the day of the date, may mean either exclusively or inclusively. *Pugh v. Duke of Leeds*, Cowp. 714; see *Welch v. Fisher*, 2 Moore, 378. [8 Taunt. 338, S. C.]

(b) *Green v. Rennett*, 1 T. R. 656. An act passed in the 24th year, &c. when the parliament was continued by prorogation till the 25th year, &c. being described in a conviction as passed in the latter year, the variance was held to be immaterial. *R. v. Windsor*, 2 Chitty's R. 513.

(c) 1 Roll. 754, l. 40.

(d) *Blackmore v. Fleming*, 7 T. R. 447. Where, on a *sci. fa.* on a judgment, a judgment was alleged to be a judgment for damages by reason of the non-performance of a certain promise and undertaking, and the judgment itself was for the non-performance of certain promises and undertakings, the variance was held to be fatal. *Baynes v. Forrest*, 2 Str. 892. But it seems that the case was adjourned. 1 Ford, 38. See *Black v. Lord Braybrook*, 2 Starkie's C. 7. But an averment that issue was joined, was held to be proved by an information containing two counts on each of which issue was joined. *R. v. Jones*, Peake's C. 38.

The plaintiffs being assignees of *B. Tabart*, sued as such on a recognizance of bail, the defendants pleaded *compenerunt ad diem*, and on the production of the roll it appeared that bail had been put in at the suit of the plaintiffs, as the assignees of *B. Tarbart*, and the plaintiffs had judgment (e). So an allegation that a commission of bankrupt issued against the surviving partner of *Edmund Darby*, is not proved by evidence of a writ to supersede a commission against *Edward Darby* (f), although the plaintiffs were in fact surviving partners of *Edmund Darby*.

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By name.

* In an action against a surety on a bail-bond, an averment of the issuing of a *latitat* against *Francis J.* by the name of *John J.* is not supported by proof of a *latitat* against *John J.*, although the bond was signed by the principal in this form, "*Francis J.* arrested by the name of *John J.*" (g) (1). But it seems that a mere variance, from the omission in the declaration of the description which is superadded in the record, is not material unless some ambiguity result (h). The declaration styled a party in a former cause *Samuel Glover*, but the record in reciting the judgment against *Glover* styled him *Samuel Glover*, the younger; but the objection was over-ruled, for although the declaration did not give the party his full description, yet it did not give him a wrong description (i) (2).

Where an indictment alleged that an action was depending between *A.* and *B.* and the judgment produced began, '*B.* sued by the name of *C.* was summoned,' &c. it was

(e) *Bingham & others v. Dickie*, 5 Taunt. 814.

(f) *Matthews & another v. Dickinson*, 7 Taunt. 399. [1 Moore, 104, S. C.]

(g) *Scandover v. Warne*, 2 Camp. 270.

(h) *Amey v. Long*, 1 Camp. 14.

(i) Ibid. So where the declaration described a writ as against *M. B.*, and the writ produced was against *M. B.* spinster. *Brown v. Jacobs*, 2 Esp. C. 726. *Secus*, as to the converse. *Ib.*

[1] [See *Grant v. Naglor*, cited Vol. II. 649, note (1).]

[2] [In *Dekentland v. Somers*, 2 Root, 437, a declaration on a judgment against *A. S.* and *D. G.* was held not to be supported on a plea of *nul tiel record*, by a judgment against *A. S.* and *D. G. Junior*.

Where the plaintiff in an action of trespass *quare clausum fregit*, declared by the name of *William Robinson*, and the deed under which he claimed title to the *locus in quo* was to *William T. Robinson*, the variance was held immaterial. The letter *T.* was no part of the plaintiff's name, for the law recognizes but one christian name. *Franklin & al. v. Talmadge*, 5 Johns. 84.]

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By name.

held that the omission of the name by which *B.* was mis-called in the process was immaterial (*k*). So it seems in general that if the name of the party be not alleged as descriptive of the record, and be truly alleged, a variance from it on reading the record will not be material (*l*).

- So a variance as to the number of parties (*m*), or parcels described (*n*), or damages (*o*), will be fatal. * Thus a variance in setting out a covenant of a lease in alleging the *Cellar-beer* field for the *Allerbeer* field, is fatal, although the plaintiff offer to wave damages on that breach (*p*).

Where the declaration on a deed of covenant recited certain premises to be late in the occupation of *Samuel R.* and in the lease it stood *Saul R.*, the variance was held to be fatal (*q*).

If a judgment for an entire sum be stated, a variance will be material; but if the judgment be for several distinct sums, an allegation that the judgment was given for one or more of those sums, according to the fact, without noticing the rest, will be good (*r*).

A variance is immaterial where the defendant is precluded from taking advantage of it by estoppel; as where he has executed a deed by a name which is not his own (*s*), or by an act of his which operates in the nature of an estoppel. Thus a lessee or assignee of a lessee is estopped from disputing the title of his lessors (*t*). And therefore, where the plaintiffs who derived title from two of four lessors, the two other lessors having no interest in the premises, alleged a demise by the four, and also alleged that two of the four had no title, the objection being taken that

- * 1603 * the plaintiffs should have alleged a demise by the two

(*k*) *R. v. Windus*, 1 Camp. 406. *n*.

(*l*) *Vide supra*, 1137.

(*m*) 1 Rol. 753, l. 45. *Rastall v. Straton*, 1 H. B. 49.

(*n*) 3 Co. 2. a.

(*o*) 1 Rol. 754, l. 40.

(*p*) *Pitt v. Green*, 9 East, 188.

(*q*) *Bowditch v. Mawley*, 1 Camp. 195. See *Pitt v. Green*, 9 East, 188.

(*r*) *Phillips v. Eamer*, 1 Esp. C. 355; where judgment was given on a *scire facias* for the debt and costs in the original action, also for the non-prossing of a writ of error brought on that action, and for the damages and costs in the *scire facias*; and the declaration against the sheriff for a false return stated the first two sums only.

(*s*) *Gould v. Barnes*, 3 Taunt. 504; *supra*, Vol. I. 302.

(*t*) *Atkinson v. Coatsworth*, 1 Str. 512. And per Gibbs, C. J. in *Wood v. Day*, 1 Moore, 399. [6 Taunt. 646. S. C.]

who had title, it was held that the defendant was estopped by the lease (t).

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An allegation, in an action against an acceptor, that the bill was drawn by certain persons trading under the name and firm of *A. B. and Co.* is satisfied by proof of a bill accepted by the defendant, and purporting to have been drawn by *A. B. and Co.* although it be proved that the firm consists of but one person (u); for the defendant is precluded from taking the objection by his acceptance.

Parties.

4thly, Where a fact is simply alleged, without vouching any instrument, and the instrument is used as mere evidence, a variance will not be fatal, if the substance of the allegation be proved (1).

Where the writing is used as mere evidence.

A declaration for not indemnifying the plaintiff alleged that *D. P.* afterwards, to wit, in Michaelmas term, 58 G. III. recovered and obtained judgment against the plaintiff, and the record produced was of *Hilary* term, the variance was held to be immaterial, the time not being alleged as descriptive of the instrument by means of a *prout patet* (x).

An allegation that rent is due in respect of a certain messuage, dwelling-house and premises, is supported by evidence of a lease of two messuages, for premises may be considered as a cumulative description (y).

(t) *Wood v. Day*, 1 Moore, 389. [6 Taunt. 646. S. C.]

(u) *Bass v. Clive*, 4 M. & S. 13.

(x) *Phillips v. Shaw*, 4 B. & A. 435; 5 B. & A. 984; *supra*, 1599. [See *Brooks v. Bemiss*, 8 Johns. 455.]

(y) *Taylor v. Brooke*, 3 M. & S. 169. An averment, that in consideration that the defendants had become tenants to the plaintiff of certain premises, they undertook to keep the same in good and tenantable repair, is proved by an agreement containing a variety of provisions, and amongst others, that the defendants would make good all repairs within three months after notice by the plaintiff of the want of repairs; for the obligation to repair arises out of the

(1) [In assumpsit for money paid to the defendant's use, the declaration stated that an execution had been issued against the defendants, inhabitants of the town of N., for taxes, and that property had been seized thereon, for which the plaintiff had given his receipt; and that in consequence thereof was eventually compelled to pay the money in satisfaction of the taxes: A receipt was given in evidence stating the property to have been seized on an execution against the collector: It was held that the variance was not fatal, evidence having been produced that the execution, on which the property was seized and receipted, was in fact against the town. *Beers v. Botsford & al.*, 3 Day, 159. But in an action on a sheriff's bond, the declaration for the non-payment of taxes of 1785, the record of a judgment for the balance of taxes, collected by him in 1786, is not admissible evidence. *Berkeley v. Cook*, 3 Call, 378.]

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IV.

Where the
writing is
used as mere
evidence.

* 1604

An allegation in an action on the case for a conspiracy to indict for barrettry, alleged it to be *coram justiciariis de pace necnon ad diversas felonias*, &c. and the indictment proved was before justices of the peace, without more, it was held to be no variance, for * as justices of the peace they might take the indictment (z).

Where a declaration averred that the defendant charged the plaintiff with violently assaulting him, and procured a warrant to apprehend him for the said offence, and it appeared that the charge was made for assaulting and striking, and the warrant produced recited the charge to be for assaulting and beating, it was held that the variance was not material (a).

But if a party unnecessarily allege that to have been effected by means of a judgment on record, which might have been alleged generally, and proved by other means, he will be bound to prove it by a judgment of record (b).

The plaintiff alleged that the defendant permitted his bill to be discontinued for want of prosecution thereof, and that thereupon it was then and there considered by the said Court that the said defendant should take nothing by his said bill *prout patet*, &c. whereby the said suit then and there became and was wholly ended and determined; it was held that this was not proved by the production of the rule to discontinue, although had the allegation been general it would have been satisfied by the production of the rule and payment of costs (c).

Description of
judgments.
Process, &c.

* 1605

The averment of a judgment with a *prout patet per recordum* does not render proof by a record necessary where, from the nature of the judgment, as averred, it appears that it is not of record, as where the plaintiff declares in debt on a judgment in Jamaica (d).

* Where it is necessary to allege a court having judicial authority, it is not essential that the style set out in the record should be exactly copied (e).

tenancy, and the agreement was evidence to prove the promise as laid. *Colley v. Streeton*, 2 B. & C. 273.

(z) Cro. Jac. 32; Yel. 46. [and note to the American edition.]

(a) *Byne v. Moore*, 5 Taunt. 187. [1 Marsh. 12. S. C.]

(b) 5 Price, 540.

(c) *Gadd v. Bennett*, 5 Price, 540. It was also held that a variance from the sum in the *ac etiam* part of a note was fatal; *vide supra*, 1835.

(d) *Walker v. Witter*, Doug. 1. And see *Wigley v. Jones*, 5 East, 440; but see *Turner v. Eyles*, 3 B. & P. 456.

(e) *Constantine v. Barnes*, Cro. Jac. 32; *Busby v. Watson*, 2 Bl. Rep. 1050. See also *Draper v. Garratt*, 2 B. & C. 2. *Supra*, 1534.

Where a declaration in an action for a malicious prosecution alleged that the defendant caused the plaintiff to be indicted at the general quarter sessions of the peace for Middlesex, and the record stated the indictment to have been found at the general sessions, it was held to be sufficient, the offence being cognizable at such general sessions (*f*).

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IV.

Description of
courts.
Process, &c.

In an action for not indemnifying the sheriff, against whom trover had been brought for levying under a *fi. fa.*, after an act of bankruptcy, an allegation that an action was prosecuted for the recovery of the said money was held to be sufficient (*g*).

Action.

A bill of Middlesex is well described as a precept of the king (*h*).

An allegation that an action is depending in his Majesty's Court of the Bench at Westminster is not supported by proof of a pluries bill of Middlesex, for by such an allegation the Court of Common Pleas must be intended (*i*).

An averment that a defendant was acquitted by a jury in the Court of our said Lord the King, before the King himself, is a description of an acquittal on a trial at bar, and is not proved by an acquittal at Nisi Prius (*k*).

A commission of bankrupt, though under the great *seal, * 1606 does not issue out of chancery; and it seems that an averment that it did so would be fatal (*l*).

Under penal statutes, allegations of the receipt or embezzling of money are not satisfied by evidence of the receiving or embezzling bank notes or bills of exchange, or other equivalent for money (*m*).

Money.

An averment that *A.* has received 500*l.* is not satisfied

(*f*) *Busby v. Watson*, 2 Bl. Rep. 1050. *Secus*, if the general sessions had not had authority. *Ib.*

(*g*) *Batchelor & another v. Salmon*, 2 Camp. 525.

(*h*) *Harris v. Bernard*, 2 Str. 1069.

(*i*) *Impey v. Taylor*, 3 M. & S. 166. And see *Renalds v. Smith*, [6 Taunt. 551.] 2 Marsh. 258.

(*k*) *Woodford v. Ashley*, 11 East, 509; 2 Camp. 193.

(*l*) *Poynton v. Foster & others*, 3 Camp. 58.

(*m*) *Supra*, 842. Where a clerk was charged with having received a 50*l.* bank-note, and 14*s.* and 10*d.* in money, and having embezzled the money, but the party who paid it could not state how he paid it, whether all in notes, or by a draft, Bayley, J. directed an acquittal (*R. v. Isles*, Surrey Spring Assiz. 1816; Mann. Ind. 372), and said that it ought to have been proved that the defendant received the 14*s.* 10*d.* in monies numbered.

PART IV.	by evidence that stock to that amount has been transferred into his name (n) (1).
Description of things.	An allegation of a loan of lawful money of Great Britain is supported by evidence of a loan of foreign money, as pagodas (o).
	In the ordinary description of articles of trade, or other subject-matter of averment, a variance will be material, or otherwise, in point of law, as it is material or immaterial in point of fact in ordinary language and acceptance. If the agreement alleged be to deliver merchandiseable corn, proof of an agreement to deliver good corn of the second sort is insufficient (p) (1).
	Where the defendant in an action on a bond pleaded that the bond was given to receive money won by the plaintiff from the defendant at a game called <i>Faro</i> , it was held to be necessary to prove the money to have been lost at that particular game (q).
* 1607 Reconciliation of variance by averment.	* It has been seen, that where a written instrument, such as a record, is vouched in proof of an allegation, parol evidence is in many instances admissible to reconcile the allegations with the instrument (r). But where a variance occurs, which without extrinsic explanation would be fatal, it seems that an averment of identity is usually necessary to warrant such evidence.
	The defendant in ejectment for the manor of Artam pleaded ancient demesne, and when Doomsday Book was brought into Court, offered to prove that the manor was anciently called Nettam, but the evidence was rejected, for the variance ought to have been averred on the record (s).

VENDOR AND VENDEE.

Action by the vendor of real property.	THE vendor of a real estate, in an action against a purchaser for not completing the contract according to his
	(n) <i>Jones v. Brindley</i> , 3 Esp. C. 205.
	(o) <i>Harrington v. Macmorris</i> , 5 Taunt. 228. [1 Marsh. 33. S. C.]
	(p) B. N. P. 145; 1 Ld. Ray. 735.
	(q) <i>Mazzinghi v. Stephenson</i> , 1 Camp. 291. See <i>Calborne v. Stockdale</i> , 1 Str. 493; <i>Sigell v. Jebb</i> , 3 Starkie's C. 1.
	(r) <i>Supra</i> , tit. <i>Parol Evidence</i> , 1046; Vol. I. 199; Stark. Criminal Pleadings, 325. 329, 2d. edit.
	(s) <i>Gregory v. Withers</i> , 28 C. II. Gilb. Ev. 44; 3 Keb. 588.

(1) [See Vol. II. 84, note (1)].

agreement, must prove, 1st, the agreement; 2dly, the performance of conditions precedent; 3dly, the damages.

PART
IV.

The contract to be valid must be in writing (t); and a sale by auction is within the statute (u).

2dly, *The performance of conditions precedent* (x).—The vendor must prove, either that he has executed *the conveyance, or that he has offered to do so, unless the vendee has discharged him from so doing (z).

Conditions
precedent.
* 1608

Where *A.* agreed to sell an estate to *B.* before a particular day, for the sum of —*l.*, in consideration whereof *B.* agreed to pay that sum on that day, and on failure, to pay the sum of 21*l.*, it was held that *A.* could not recover the 21*l.* without showing that he had conveyed the estate to *B.*, or that he had tendered a conveyance properly executed (a).

And where the plaintiff covenanted to sell a house to the defendant, and to convey the same before the 1st of August, and to deliver possession of the same on a previous day, and the defendant in consideration thereof covenanted to pay the plaintiff 120*l.* on or before the 1st day of August, it was held that the plaintiff could not maintain an action for the 120*l.* without averring that he had conveyed or tendered a conveyance to the defendant (b).

The purchaser may refuse to accept a conveyance executed under a power of attorney (c).

(t) 29 C. II. c. 3, s. 4; *supra*, 592.

(u) *Supra*, 598. 606, 7. 614.

(x) In agreements, the question whether covenants be dependent or independent depends upon the intention of the parties. They are usually considered to be dependent, unless a contrary intention appear. See 1 Will. Saund. 320; *Smith v. Woodhouse*, 2 N. R. 233; *Havelock v. Geddes*, 10 East, 555; *supra*, tit. *Assumpsit*. [See, on this subject, *Gardiner v. Corson*, 15 Mass. Rep. 500. *Couch v. Ingersoll*, 2 Pick. 292. *Tileston & al. v. Newell & al.* 13 Mass. Rep. 406. *Parker v. Parmele*, 20 Johns. 130. *Robb v. Montgomery*, *ibid.* 15. *Hampton v. Speckenagle*, 9 Serg. & Rawle, 212.]

(z) *Jones v. Barkley*, Dougl. 684. *Phillips v. Fielding*, 2 H. B. 123. But it is no defence to an action on a bill of exchange, given as the consideration for an estate, that the vendor has refused to convey. *Moggridge v. Jones*, 14 East, 486. 3 Camp. 38. *Swan v. Cox*, 1 Marsh. 176.

(a) *Goodisson v. Nunn*, 4 T. R. 761.

(b) *Glazebrook v. Woodrow*, 8 T. R. 366. *Vide supra*, 91. See also *Morton v. Lamb*, 7 T. R. 129. *Mason v. Corder*, 7 Taunt. 9; 2 Marsh. 332. *Ferry v. Williams*, 8 Taunt. 62. 1 Moore, 498.

(c) *Coore v. Callaway*, 1 Esp. C. 115, Cor. Ld. Kenyon. *Richards v. Barton*, 1 Esp. 268. See *Baxter v. Lewis*, Forrester, 61.

PART
IV.

Conditionous
precedent.
* 1609

But if on tendering a draft to the defendant, he refuse to read it, and discharge the plaintiff from executing it, it is sufficient to prove this; it is not incumbent on the plaintiff to go on and do a nugatory act (*d*). But where by the terms of the agreement * the vendee is to prepare the conveyance, the vendor may maintain an action without tendering a conveyance (*e*); and if the conveyance is to be executed at the expense of the vendee, the latter is bound to tender it (*f*) (*1*).

Where the defendant agrees to pay the whole or part of the purchase-money on having a good title, it is necessary for the vendor to allege what title he had, and to prove it accordingly (*g*). But where the vendor averred that he was seised in fee, and made a good and satisfactory title to the purchaser by the time specified in the conditions of sale, it was held to be sufficient, and that it was unnecessary for him to show how he deduced his title to the fee (*h*).

And even where the title is set out, it has been held by Lord Kenyon to be sufficient to produce the title deeds at the trial, without proving their execution (*i*). He said, that where the question was respecting a title, he would never allow that the party should be called upon to prove the execution of all the deeds deducing a long title; that it was never mentioned in the abstract, or expected, in

(*d*) *Jones v. Barkley*, Dougl. 684. *Phillips v. Fielding*, 2 H. B. 123.

(*e*) *Hawkins v. Kemp*, 3 East, 410.

(*f*) *Seaward v. Willock*, 5 East, 198. *Qu.* whether it be not a general rule, in the absence of any express stipulation, that the purchaser ought to prepare and tender the conveyance. See *Sugden's Law of Vendor and Purchaser*, 222. And it was so held in *Barter v. Lewis*, Forrest, 61. And see *Martin v. Smith*, 2 Smith, 543. But see *Heard v. Wadham*, 1 East, 627; Ld. Eldon's opinion, in *Seton v. Slade*, 7 Ves. jun. 278; Sir A. Macdonald's, in *Grossock v. Smith*, 3 Anstr. 877; Ld. Rosslyn's, in *Pincke v. Curteis*, 4 Bro. C. C. 332.

(*g*) *Phillips v. Fielding*, 2 H. B. 123. See the *Duke of St. Alban's v. Shore*, 1 H. B. 270. And where a good title is to be made out by a certain day, the vendee is not bound to make any application before the day. *Berry v. Young*, 2 Esp. C. 640, n. Cor. Ld. Kenyon.

(*h*) *Martin v. Smith*, 6 East, 555.

(*i*) *Thomson v. Miles*, 1 Esp. C. 184.

(1) [See *Swietzer Hummel*, 3 Serg. & Rawle, 228. *Hudson v. Swift*, 20 Johns. 24. *Beasley v. Gillespie*, 4 Bibb, 314.]

making out a title in the * case of any purchase, more particularly where possession has accompanied them. Yet in a later case *Mansfield, C. J.* held at *Nisi Prius* that the vendor of the residue of a term, being the third or fourth assignee, was bound to prove all the mesne assignments (*k*).

Although it is unnecessary to notice in the declaration, representations contained in the particulars of sale as to the state of repair, and other collateral matters, yet it is essential to prove at the trial that the plaintiff can make title to the several matters as sold (*l*). Thus, where the particulars of sale state a right of cart-way to be appurtenant to a house, it is sufficient to set out so much of the agreement as relates to the house, without stating that part which relates to the cart-way, but still the title to the cart-way must be proved on the trial (*m*).

The purchaser of a lease under a contract, describing it as containing none but the usual covenants, is not bound to accept an assignment if the lease contain an unusual covenant, although it be bad in law (*n*).

A defendant who has never applied for a title is not allowed to set up the want of it against the plaintiff who has obtained one (*o*), after the commencement of the action.

But upon an undertaking by a vendor to convey a new inclosure to the vendee, he must convey the legal estate; it is not sufficient for the vendor to substitute the vendee's name for his own to entitle him to an assignment from the commissioners (*p*).

* It is not sufficient to show by mere presumptive evidence that the premises have been discharged from an incumbrance to which they were formerly subject. * 1611 Tide.

Where a leasehold was sold as subject to a ground-rent, which was said to have been apportioned out of a larger rent, but such an apportionment was not evidenced by any existing deed, but only by presumptive evidence, it was held that the purchaser was not bound to accept the title (*q*).

(*k*) *Crosby v. Percy*, 1 Camp. 303. But *Ld. Kenyon's* decision was not cited. See *Sugden's V. & P. &c.* 216.

(*l*) *Thomson v. Miles*, 1 Esp. C. 184.

(*m*) *Ibid.*

(*n*) *Hartley v. Peahall*, Peah's C. 131, Cor. *Ld. Kenyon*.

(*o*) Per *Ld. Kenyon*, in *Thomson v. Miles*, 1 Esp. C. 184.

(*p*) *Cane v. Baldwin & others*, 1 Starkie's C. 65.

(*q*) *Barnwall v. Harris*, 1 Taunt. 430.

PART
IV.Conditions
precedent.
Title.

Where the objection to a bill was that it was doubtful whether the wife of a party to a deed, thirty years old, was barred by that deed of her dower, it was held that it was no answer to prove upon the trial that the wife was dead, no such proof having been given before (r).

It seems to be quite settled, that a court of law will take notice of equitable objections to titles. It would be fruitless to compel the defendant to pay money which a court of equity would order him to refund (s).

Where the words of the condition were, that the vendor should make out a good title, it was held that he must make out a title, good both at law and in equity (t), for the question is, whether the condition has been complied with (1).

(r) *Wilde v. Fort*, 4 Taunt. 334. Where a title under a conveyance is fortified by sixty years' possession, the loss of a recited deed throws no reasonable doubt upon the title, *Prosser v. Watts*, 6 Madd. 59.

(s) *Maberly v. Robins*, 1 Marsh. 258; 5 Taunt. 625; and per *Ld. Alvanley* in *Elliott v. Edwards*, 3 B. & P. 181. In the case of *Alpass v. Watkins* (8 T. R. 516), *Ld. Kenyon* held that a court of law could not enter into equitable objections to a title where the purchaser is plaintiff.

(t) *Maberly v. Robins*, 1 Marsh. 258. 5 Taunt. 625.

(1) [An agreement to make a *lawful deed of conveyance*, means a deed conveying a lawful or good title; and if the vendor covenant to make a *lawful deed* of conveyance, he is bound to produce his title, and offer himself ready to execute a deed. *Dearth v. Williamson & al.* 2 Serg. & Rawle, 500. See also *Clute v. Robison*, 2 Johns. 595. An agreement to make "a warranty-deed, free and clear of all incumbrances" is not fulfilled by making a deed with covenants of general warranty and freedom from incumbrances, unless the grantor had the absolute, entire and unincumbered estate in the land, at the time of the conveyance. *Porter v. Noyes*, 2 Greenleaf, 22. A covenant to convey the title, means the legal estate in fee free of all valid claims, liens and incumbrances whatever. *Jones v. Gardner*, 10 Johns. 266. A covenant to give "a good and sufficient deed" does not bind the covenantor to give a deed with warranty. *Gazley v. Price*, 16 Johns. 267. *S. P. Van Eps v. Mayor, &c. of Schenectady*, 12 Johns. 436. Where A. agreed to sell land to B. and covenanted to "give a deed of the premises" to him at a certain time and place, the tender of a mere quit-claim deed, without covenant or warranty, is sufficient; and it is not necessary that A.'s wife should join in the deed. *Ketchum v. Evertson*, 13 Johns. 359. Where the conditions of sale at auction were that the vendor should execute a deed with warranty of title except as to certain quit-rents, it was held that the agreement was not merely that he should give a deed with warranty, but that he was able to convey an indefeasible title, subject to no other incumbrance except the quit-rents. *Judson v. Wass*, 11 Johns. 525.

In Massachusetts, it is held that if a bond be given to convey land

PART
IV.

Ejectment by
a vendor.

A vendor who has let the intended vendee into * possession cannot recover the premises by ejectment without proof of a demand of possession, for till then the possession is lawful (u), unless the defendant agreed to quit possession on a day previous to the day of the demise, for then, on non-performance, ejectment will lie (x) (1).

(u) *Right v. Beard*, 13 East, 210; *Doe v. Lawder*, 1 Starkie's C. 306. See *Hegan v. Johnson*, 2 Taunt. 148. If the party were lawfully in possession at the time of the action brought, it is an answer to the action, whatever be the time of the demise. *Doe d. Newby v. Jackson*, 1 B. & C. 448.

(x) *Doe v. Sayer*, 3 Camp. 8. And see *Doe v. Smith*, 6 East, 530. *Doe v. Breach*, 6 Esp. C. 106.

by a good and sufficient deed of warranty, on the payment of money by the obligee to the obligor, the condition will be performed, if the deed be of a proper form and regularly executed, and the grantor be seized; for the import of the words does not extend to the title of the grantor to be conveyed, but is confined to the form of the deed, and its execution; and as the money is to be first paid, the obligee may as well sue on the covenant in his deed, as on his bond. *Aiken v. Sanford*, 5 Mass. Rep. 494. *Aliter*, perhaps, if the condition of the bond be that the money shall be paid on the delivery of the deed. *Ibid*.

An agreement stating that A. has "granted, bargained, and sold, and doth absolutely grant, bargain and sell," &c. and covenanting to give a good and sufficient title at a future day, upon B.'s making certain payments, does itself convey the land; and the agreement to give a good title afterwards means a more formal deed rather than title strictly speaking. *Scott v. Conover*, 1 Halsted's Rep. 222.

In Kentucky, under a bond to make "as good title as the Commonwealth of Virginia should make," the obligor must convey with general warranty. Decisions of the Court of Appeals of Kentucky, 177. So, under a bond "to make a sure and indefeasible right and title, such as the State makes." *Kelly v. Bradford*, 3 Bibb, 317. So, where a bond is with condition "to make, or cause to be made, a deed for a certain tract," &c. *Steel v. Mitchell*, Decisions of the Court of Appeals of Kentucky, 47. *Bard v. Grundy*, *ibid*. 195.]

(1) [After articles for the sale of land, on which the vendor receives part of the purchase money, and the residue is to be paid by instalments, if the times of payment have long expired without payment by the vendee, before or after suit brought, the vendor may recover in ejectment against the vendee. *Marlin v. Willink & al.* 7 Serg. & Rawle, 297. See also *Lessee of Mitchell v. De Roche*, 1 Yeates, 12. In Pennsylvania, where there is no court of chancery, the courts of law consider that as done which chancery would decree to be done—and where A. agrees with B. for the purchase of land, enters into possession and pays the purchase money, he stands in the same situation as if he had received a conveyance. Per Tilghman, C. J. *Moody v. Vandyke*, 4 Binney, 41. So, where articles of agreement are made for the sale of land, the vendee, on tendering the purchase money, may recover the land in ejectment. *Haven v. Norris & al.* 4 Binney, 77. *Griffith v. Cochrane*, 5 ib. 105. *Stein v. North*, 3 Yeates, 324. *Vincent v. Lessee of Huff*, 4 Serg. & Rawle, 301.]

PART
IV.

A vendor who has let the vendee into possession, but who can make no title, cannot recover for growing crops which were to be taken at a valuation, the contract being entire (y); neither, as it seems, can he recover for use and occupation (z).

Action by vendee of real estate.

Where the purchaser is to prepare the conveyance, he cannot maintain an action for breach of contract, or to recover the deposit, without proving a tender of a conveyance, unless he be discharged by the act of the vendor; or unless the preparing a conveyance would be a nugatory act for want of title in the vendor (a).

Particular of objections.

Where the vendee objects to the abstract of title, as insufficient, defective and objectionable, the court will, at the instance of the defendant, require the plaintiff to deliver a particular, specifying the matters of fact which he intends to rely upon at the trial, as being the cause of his not being able to complete the purchase (b); but he is not bound to state any objection in point of law arising from the abstract (c). * And where no such particular has been obtained, the plaintiff is not confined at the trial to those objections which he has stated to the vendor, but may rely on any other (d) (1).

* 1613

Where the vendee in a special action for breach of contract relies on a defect in title, he must prove the defect; it is not sufficient to prove the mere opinions of conveyancers (e).

Damages.

The plaintiff is entitled to recover as damages, on counts properly framed, not only the amount of his deposit, but also interest upon it, and even interest on the residue of the purchase-money, which has been lying ready to be

(y) *Neal v. Viney*, 1 Camp. 471; *supra*, 1519.

(z) *Hearn v. Tomlin*, Peake's C. 192; *supra*, 1519.

(a) *Seaward v. Willock*, 5 East, 198. *Lowndes v. Bray*, Cor. Ld. Ellenborough, Sitt. after Trin. Term, 1810; Sugden's V. & P. 223, 6th edit.

(b) *Collett v. Thompson*, 3 B. & P. 246.

(c) *Ibid*.

(d) *Squire v. Tod*, 1 Camp. 293. *Collett v. Thompson*, 3 B. & P. 246.

(e) *Camfield v. Gilbert*, 4 Esp. C. 221.

(1) [If the vendor bind himself to execute a deed and deliver possession, and the vendee refuse to accept the deed on account of an alleged defect in it, he cannot entitle himself to damages, by showing that the vendor was not able to deliver possession. *Pickering v. Stapler*, 5 Serg. & Rawle, 107.]

paid without making interest (*f*). It seems that he may also recover the expenses incurred in investigating the title (*g*). And where the vendor misrepresents the charges affecting the estate, the purchaser may recover the interest of money procured to complete the purchase, as well as the expenses of investigating the title and completing the conveyance (*h*); as where the intended grantor of an annuity represents that there are no judgments against him, in consequence of which the intended purchaser does not search until the transaction is ready to be completed (*i*). And if the action be brought against an agent who sold without sufficient authority, the plaintiff may also recover the * costs of a suit against the principal for a * 1614 specific performance (*k*).

PART
IV.

Action by
vendee.

Where the vendee relies on a defect in the vendor's title, and no fraud is imputable to the vendor, the plaintiff does not usually recover more than nominal damages (*l*).

If on breach of contract by the vendor, the vendee elect to disaffirm the contract, and to recover the deposit as money had and received to his use, he must prove the circumstances, and show that the contract is wholly unexecuted (*m*); but if there has been a part execution of the contract, such that it cannot be wholly rescinded, so as to

Money had
and received.

(*f*) *Flureau v. Thornhill*, 2 Bla. Rep. 1078.

(*g*) *Kirtland v. Pounsett*, 2 Taunt. 145; *Turner v. Beaurain*, Cor. Ld. Ellenborough, Guildh. 2d June 1806. But see *Campfield v. Gilbert*, 4 Esp. C. 221; and *Wilde v. Fort*, 4 Taunt. 334, where Mansfield, C. J. held the contrary, and ruled also that interest on the deposit was not recoverable.

(*h*) *Richards v. Barton*, 1 Esp. C. 268; *Turner v. Beaurain*, Sugden's V. & P. 209; *Coore v. Callaway*, 1 Esp. C. 115.

(*i*) *Coore v. Callaway*, 1 Esp. C. 115.

(*k*) *Jones v. Dyke*, Sugden's V. & P. App. No. 8.

(*l*) See 1 B. & P. 307; *Flureau v. Thornhill*, 2 Bla. Rep. 1078; *Brig's case*, Palm. 364. In the case of *Bratt v. Ellis*, (C. B. Mich. & Hil. T. 45 Geo. III. cited in Mr. Sugden's Treatise, App. No. 7,) where an auctioneer having a lien on property, sold it after the expiration of the authority given him by the owner, who refused to complete the contract, the Court is stated to have held that the purchaser was not entitled to more than the deposit, with interest, the costs of investigating the title, and the costs of the action as between attorney and client; although the Jury, on the execution of a writ of inquiry, after judgment by default, had given a verdict for 350*l.*, allowing 250*l.* as damages for the loss of the bargain.

(*m*) *Hunt v. Silk*, 5 East, 449. *Squire v. Tod*, 1 Camp. 293; 2 Burr. 1011. *Farrer v. Nightingal*, 2 Esp. C. 639. *Levy v. Haw*, 1 Taunt. 65.

PART
IV.

place the parties in *statu quo*, the party must resort to his action for breach of the special contract (n) (1).

Action by
vendee.

(n) Where *A.* agreed to let *B.* into immediate possession of a house, and repair it, and execute a lease within ten days, in consideration of which *B.* paid 10*l.* and took possession, and *A.* neglected to execute the lease, and make the repairs beyond the ten days, and *B.* continued in possession after the ten days, it was held that *B.* could not afterwards rescind the contract. *Hunt v. Silk*, 5 East, 449.

(1) [A purchaser of land, after a deed executed, cannot recover back the purchase money, unless there has been fraud or a warranty. *Dorsey v. Jackman*, 1 Serg. & Rawle, 42. But in Pennsylvania, if the consideration money has not been paid, the purchaser, unless it plainly appears that he has agreed to take the risk of the title, may defend himself in an action for the purchase money, by showing that the title was defective, either in whole or in part, whether there was a covenant of general warranty, or of a right to convey, or of quiet enjoyment by the vendee, or not, and whether the vendor has executed a deed of the premises, or not. *Steinkur v. Wisman*, 1 Serg. & Rawle, 438. *Hart v. Porter*, 5 ib. 204. Thus, a purchaser who has accepted a conveyance with special warranty, but has not paid the purchase money, may defend himself, in an action for the money, on the ground of a defect of title, when he has no covenants on which he can have recourse, although there has been no eviction. *Hart v. Porter*, ubi sup. See also *Cornahan v. Hall*, Addison's Rep. 127, and the observations of Yeates, J. 5 Binney, 365.

In South Carolina also, defect in title or quality of land may be given in evidence against a demand upon bond or note for the consideration money. *Thompson v. M'Cord*, 2 Bay, 76. *Sumter v. Welsh*, ibid. 558. *Adams v. Wylie*, 1 Nott & M'Cord, 78. This peculiarity in the law of S. Carolina and Pennsylvania, is said, by the courts of the former state, to be of questionable policy and ought not to be extended. *Hord v. Huff*, 2 Rep. Con. Ct. 162. Deficiency in the quantity of land sold may likewise be given in evidence as a defence against a suit for the purchase money. *Farman v. Elmore*, 2 Nott & M'Cord, 189. *Peay v. Briggs*, ibid. 184. *Shelton v. Garry*, 1 M'Cord, 470.

See *Smith v. Evans*, 6 Binney, 102. *Boar v. M'Cormick*, 1 Serg. & Rawle, 166.

Where a contract is made for the purchase of land, and there is a failure of title as to part, if the part lost appear to be so essential to the residue that it cannot reasonably be supposed the purchase would have been made without it, the contract is dissolved *in toto*. Such would be the case of the loss of a mine, or a valuable fishery, or of water necessary for a mill. But a contract for the sale of lots in different parts of a city is not dissolved by the failure of title to five of the lots, not adjoining or particularly connected with the others, and not essential to their use or enjoyment. In such case, the vendee is entitled only to a deduction proportioned to the loss. *Stoddart v. Smith*, 5 Binney, 355. Where two conveyances were made for two tracts of land on the same day, and one bond taken for the consideration, and the contract for one of the tracts is rescinded for defect of title, it lies on the ven-

PART
IV.

The purchaser may recover the deposit as money had and received to his use, though the agreement for sale be unsigned and unstamped (o).

* This action may be maintained by the principal who has paid the money, although his agent made the purchase, and signed the contract in his own name, and was considered to be the principal by the vendor (r). So one who has signed the contract, as agent for another, may maintain the action against the vendor, where the contract is rescindable, if the principal has denied that he gave authority and has repudiated the contract (s).

Action by
vendee.
Money had
and received.
* 1615

The plaintiff in this form of action cannot recover more than the money paid, although the estate has risen in value; but it seems that he may recover the money actually paid, although the estate has been diminished in value, but this has been doubted (t). He cannot recover the ex-

(o) *Adams v. Fairbairn*, 2 Starkie's C. 277.

(r) *The Duke of Norfolk v. Worthy*, 1 Camp. 337. See *Edden v. Read*, 3 Camp. 338. [and Mr. Howe's note.]

(s) *Langstroth v. Toulmin*, 3 Starkie's C. 145.

(t) See Sugden's Treatise, 212, 6th edit.

deed to show circumstances proving that he would not have bought one without the other—in order to vacate the contract entirely. *Greenwalt v. Horn & al.*, 3 Yeates, 6.

Where a promissory note was given for the purchase of real property, the Supreme Court of the United States held that the failure of consideration through defect of title must be total, in order to constitute a good defence at law to an action on the note. Relief for any partial defect in the title or the deed must be sought in chancery. *Greenleaf v. Cook*, 2 Wheat. 13; See also *Welch v. Watkins*, 1 Hayw. 369, where it was held that if a vendor cannot make a good title, he is not entitled in equity to payment of a note given for the purchase money. Whether after receiving a deed, the vendee could avail himself even of a total failure of consideration, was not decided in the case of *Greenleaf v. Cook*, above cited. But in Maine and Massachusetts, if the deed contain the usual covenants, the vendee cannot set up either a partial or total failure of title against the vendor's suit for the purchase money. *Lloyd v. Jewell & al.* 1 Greenleaf, 352—*Phelps v. Decker*, 10 Mass. Rep. 279. *Fowler v. Shearer*, 7 ib. 14. See vide *Frisbee v. Hoffnagle*, 11 Johns. 50, *contra*.

A vendee has no remedy in chancery, on the ground of failure of title, if he has no covenants and there is no fraud. *Chesterman v. Gardner*, 5 Johns. Ch. Rep. 29. *Gouverneur v. Elmendorf*, ibid. 79. And the fraud, in consideration of which a vendee may have relief in such case, means fraud at the time of the execution of the deed or lease, and not fraud in a subsequent and distinct transaction. *Chesterman v. Gardner*, ubi sup.

See *Infra*, 1628, note (1).]

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IV.

Action by
vendee.
Money had
and received.

penses of conveyancers' opinions, and other expenses incurred in investigating the title, on the money-counts (u).

And where the original contract is void by the statute of frauds, for want of an agreement in writing, the plaintiff, it seems, can recover no more than his deposit without interest (x).

An auctioneer is considered as a stakeholder, and should not part with the deposit until the sale has been carried into effect (y), and he cannot discharge himself by paying over the amount to the vendor (z). At all events he cannot do so after notice. * *

- * 1616 * Where the auctioneer was also the attorney of the vendor, and paid over the money after he knew that objections had been raised to the title, he was held to be liable to the vendee for his deposit (a).

Vendor of a
chattel.

The vendor of a personal chattel brings his action either on a *special contract* of sale, or for *goods sold and delivered*, or for *goods bargained and sold*.

In a special action on the case for not accepting the goods, he must prove, 1st, The contract of sale; 2dly. Performance of conditions precedent on his part; 3dly. The amount of damage.

- * 1617 1st. *The contract of sale*.—It has been seen, that a contract for the sale of goods (b) of the price of 10*l.* or upwards (c), is not binding, under the Statute of * Frauds,

(u) *Camfield v. Gilbert*, 4 Esp. C. 221.

(x) *Walker v. Constable*, 1 B. & P. 306.

(y) *Burrough v. Skinner*, 5 Burr. 2639; *Bery v. Young*, 2 Esp. C. 640, n.; *Spurrier v. Elderton*, 5 Esp. C. 1.

(z) *Jones v. Edney*, Sugden's V. & P. 37, Cor. Ld. Ellenborough; 1812.

(a) *Edwards v. Hodding*, 5 Taunt. 815. [1 Marsh. 377. S. C.] *Note*; that he was held to be liable also on another ground, inasmuch as he had misled the plaintiff as to the facts, and induced him to bring his action as he did.

(b) *Vide Supra*, 609. In the case of *Garbutt v. Watson*, (5 B. & A. 615), it was observed that the case of *Towers v. Osborne* (1 Str. 506; *supra*, 609) was an extreme one, which ought not to be carried farther; and according to the case of *Garbutt v. Watson*, the question in all cases seems to be, whether the contract be substantially for goods, or for work and labour and materials found. And it was held, that a contract for the sale of a quantity of flour not then prepared for delivery was within the statute. And the case of *Rondeau v. Wyatt* (2 H. B. 63) was approved of by Bayley, J., where it was held that an oral contract to deliver goods at a future time was within the statute; and the case of *Clayton v. Andrews*, (4 Burr. 2101; *supra*, 609) was disapproved of by Holroyd, J.

(c) *Supra*, 607. If several articles be bought at a shop at the same time, at different prices, each under 10*l.*, but amounting alto-

unless the buyer accept part of the goods and actually receive the same (d), or give something in earnest to bind the bargain (e), or in part of payment, or that some note

gether to a sum exceeding 10*l.*, the case is within the statute (*Bal-dey v. Parker*, 2 B. & C. 37), although the purchaser has marked some of the goods with a pencil, and assisted in cutting others from the bulk. A contrary construction would frequently enable a party to defeat the object of the statute by making a separate bargain for each article. And see *Champion v. Short*, 1 Camp. 53. But where, after a parol order given to the vendor's agent for cream of tartar, an agreement was entered into for gum lac, which was not to be absolute unless the vendor omitted to write in one or two days, although the vendor did not write, it was held that the contracts were distinct, and that the acceptance of the former order did not take the contract for the lac dye out the statute. *Price v. Lee*, 1 B. C. 156. Vide *infra*, 1622, note (e), & *supra*, 1548, note (i).

(d) *Supra*, 609. A man bargains with the servant of a vendor for the purchase of a horse, and desires the servant to deliver him at his stables at a certain time, and before its expiration shows the horse to a third person, who refuses to purchase, it was said to be a question for the Jury whether there was an acceptance or not. *Blenkinsop v. Clayton*, 7 Taunt. 597; 1 Moore, 328. And see *Chaplin v. Rogers*, 1 East, 192.

(e) Where the defendant, on the purchase of a horse, offered a shilling to the vendor's servant to bind the bargain, which was returned, it was held to be insufficient. *Blenkinsop v. Clayton*, 7 Taunt. 597. 1 Moore, 328.

In the civil law, the marking of goods by the buyer was an ambiguous act, which might or might not amount to a delivery, according to the intention of the parties. *Si dolium signatum sit ab emptore, Trebatius ait traditum id videri; Labeo contra; quod et verum est, magis enim ne summutetur signari solere quam ut tradere tum videatur*. Dig. 18. 6. 1, 2. And it is very possible that cases may occur where the acts of the parties being ambiguous, or the fact of actual delivery being doubtful, it may be a question of mere fact for the Jury. But notwithstanding this, it is usually a question of law, as it must necessarily be, whenever the Court can apply the law to the mere facts as found by the Jury (*supra*, Part III. tit. *Law & Fact*). It seems to be now fully settled, that so long as the vendor retains his lien for the price, there is no actual receipt within the statute.

In the late case of *Bal-dey v. Parker* (2 B. & C. 37; *supra*, 1616), where the defendant bought several articles at a shop, and marked some, and assisted in severing others from the bulk, it was held that there was no transfer and actual acceptance within the exception of the statute. It was observed by Holroyd, J. that upon the sale of specific goods for a specific price, by parting with the possession the owner parts with his lien. The statute contemplates a parting with the possession, and therefore as long as the seller preserves his control over the goods so as to retain his lien, he prevents the vendee from accepting and receiving them as his own, within the meaning of the statute.

The doctrine, that there can be no acceptance or actual receipt so long as the vendor's lien for the price subsists, was also laid

PART
IV.Contract of
Sale.

* 1618

* 1619

or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents lawfully authorized.

* An auctioneer, at a sale of goods by auction, is the agent of both parties, for the purpose of binding them by his signature; but he may maintain an action against the vendee in his own name, even although the name of the principal be declared at the time of sale (*f*); but if he brings the action, his signature will not be sufficient within the Statute of Frauds to bind the purchaser (*g*). A bidder may retract his bidding at any time before the knocking down of the hammer (*h*).

* The printed conditions of sale, pasted on the auctioneer's box, are sufficient notice of the terms to a purchaser (*i*).

If *A.* sell goods to *B.* who is unable to pay for them, and they are transferred to *C.* by consent, this is a new contract between *A.* and *C.* and not a mere promise on the part of *C.* to pay the debt of *B.* (*i*).

down in the case of *Carter v. Toussaint* (5 B. & A. 855.) A horse was sold by oral contract, and no time appointed for payment; the horse was to remain with the vendor for twenty days, without charge to the vendee; at the expiration of that time, the horse was sent to grass by the direction of the vendee, and by his desire entered as one of the horses of the vendor; and it was held that there was no acceptance of the horse within the statute. And the case was distinguished from that of *Elmore v. Stone* (1 Taunt. 458; *supra*, 610), on the ground that in that case there was a change of possession. So in *Tempest v. Fitzgerald* (3 B. & A. 680), where a horse was sold, to be taken away at a time specified, and paid for in ready money; and at the expiration of the time the purchaser rode him, but requested that he might remain for a longer period in the vendor's possession; and the horse died before the time when the purchaser was to take him, and to pay the price; the Court held that the vendor could not recover the price. See also *Howe v. Palmer*, 3 B. & A. 321.

(*f*) [*Hulse v. Young*, 16 Johns. 1.] *Williams v. Millington*, 1 H. B. 81; *Coppin v. Walker*, 2 Marsh. 497. 7 Taunt. 237; *Coppin v. Craig*, 2 Marsh. 501. 7 Taunt. 243; *Atkyns v. Batten*, 2 Esp. C. 493. An action may be brought either in the name of the party who actually made the bargain, or in the name of the party really interested. *Skinner v. Stocks*, 4 B. & A. 437. [See Vol. II. 63.]

(*g*) *Farebrother v. Simmons*, 5 B. & A. 333.

(*h*) *Payne v. Cave*, 3 T. R. 148. And *qu.* whether, as the auctioneer is the agent of the bidder, the latter may not retract where a memorandum is required by the Statute of Frauds at any time before the written entry is actually made by the auctioneer.

(*i*) *Mesnard v. Aldridge*, 3 Esp. C. 271.

(*i*) *Browning v. Stallard*, 5 Taunt. 450.

The entry in the broker's book, signed by him, acting as the agent of both parties, binds the bargain; so that neither party can, by refusing to receive the bought and sold notes, which are merely copies of such entry, disaffirm the bargain (*k*). And the entry, by the broker, and the bought and sold notes, copied from it, and delivered to and accepted by each party, are the proper evidence of the contract (*l*). And the bought and sold notes are, it seems, in themselves evidence of the contract, without proof of any entry in the broker's book (*m*).

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IV.

Contract.
By Broker.

Where *A.* agreed to buy, and *B.* to sell, a quantity "of St. Petersburg clean hemp," and the broker delivered a bought-note to *A.* in which, by mistake, he inserted, "Riga Rhine hemp," instead of "St. Petersburg clean hemp," and delivered a correct sale-note to *B.*; it was held that the variance was fatal, and that *B.* could not recover against *A.* for breach of contract (*n*). But where the broker in both the bought and sold notes, made a mistake in describing the * sellers' firm to be *A. B.* and *C.* which * 1620 had, in fact, without the knowledge of the broker, been changed to *A. D.* and *E.*, it was held, that the purchaser could not set up the mistake in answer to an action, without showing that he was excluded from a set-off; or otherwise prejudiced by it (*o*).

A material alteration made in the sale-note by the broker, after the bargain has been made, at the instance of the seller, without the consent of the purchaser, precludes the seller from recovering on the contract (*p*).

Where goods are ordered for a club by *A.* one of the members, every member who either concurs in the order, or assents to it, is liable, although *A.* be made debtor in the plaintiff's books, unless it appear that the plaintiff meant to give credit to *A.* only (*q*).

(*k*) *Heyman v. Neale*, 2 Camp. 337.

(*l*) *Hinde v. Whitehouse*, 7 East, 559. 569; *Rucker v. Cammeyer*, 1 Esp. C. 105; *Cooper v. Smith*, 15 East, 105; *Blagden v. Bradbear*, 12 Ves. 466. 472; *Buckmaster v. Harrop*, 13 Ves. 456.

(*m*) *Dickenson v. Lilwal*, 1 Starkie's C. 128. [4 Camp. 279. S. C.] *A.* and *B.* being jointly interested in a cargo of oil, *A.* directs the broker to sell it, the sale-note is a sufficient memorandum within the Statute of Frauds, although *B.* does not assent till after the sale. *Soames v. Spencer*, 1 D. & R. 32.

(*n*) *Thornton v. Kempster*, 1 Marsh, 355. [5 Taunt. 786. S. C.]

(*o*) *Mitchell v. Lapage*, Holt's C. 253.

(*p*) *Powell v. Divett*, 15 East, 29.

(*q*) *Delauney v. Strickland*, 2 Starkie's C. 216.

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IV.

Agent.

An agent who buys or sells for another is always liable where he buys in his own name, and credit is given to him (*r*); so if he order goods for another, but the seller refuses to deliver to that person's credit, but delivers on the credit of the agent only; so, as is said, if having ordered goods in the name of another, he afterwards refuses to inform the seller who the person is, in order that he may sue him (*s*). But if he declare himself to be merely an agent, he is not liable (*t*). But if a factor here buy or sell goods for a foreign principal, he will be personally liable, for it will be presumed that credit was given to him (*u*); but the contract is, it seems, in all cases with the principal when discovered.

- * 1621 * A vendor may sue the principal, when discovered, although the agent bought in his own name; but if, where the name of the principal is known at the time of sale, the vendor elect to give credit to the agent, he cannot, it has been seen, afterwards resort to the principal (*x*).

Goods,
Conditions
precedent.

2dly. The performance of conditions precedent (*y*).

If the goods were to be delivered at a particular place, a tender there, or that which is equivalent to a tender in point of law, must be proved, as that the defendant dispensed with the necessity of a formal tender, by a refusal to complete his contract (*z*).

It is incumbent on the vendor to show that the goods correspond with the description in the contract. If they

(*r*) Per *Ld. Kenyon*, in *Owen v. Gooch*, 2 Esp. C. 568; *Morgan v. Corder*, Paley's P. & A. 250. Where *L.* an auctioneer, signed an agreement, as agent for *A.* and afterwards *A.* signed the agreement in these terms, "I approve of *L.* having signed this on my behalf," it was held that the auctioneer was not personally liable. *Spittle v. Lavender*, 2 B. & B. 452; see *Bowen v. Morris*, 2 Taunt. 374.

(*s*) 2 Esp. C. 568. Paley's P. & A. 250.

(*t*) Ibid.

(*u*) *Gonzales v. Sladen*, B. N. P. 130. See the observations of *Eyre, C. J.* in *De Gaillon v. Victoire Harel L'Aigle*, 1 B. & P. 368.

(*x*) *Paterson v. Gandasequi*, 15 East, 62; *Addison v. Gandasequi*, 4 Taunt. 574; *Railton v. Hodgson*, and *Peele v. Hodgson*, 4 Taunt. 576.

(*y*) *Supra*, 91, note (*m*). Though there be mutual promises, yet if one thing be the consideration of the other, a performance is necessary to be averred, unless a special day be appointed for performance. *Callonel v. Briggs*, 1 Salk. 112.

(*z*) *Glazebrook v. Woodrow*, 8 T. R. 366; *Jones v. Barkley*, Doug. 687.

On a general contract, neither party is bound to do the first act. *Rawson v. Johnson*, 2 East, 203.

be described in the sale-note as of a particular quality, it is not sufficient to show that the quality, though inferior to that described, corresponded with a sample previously delivered (a).

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IV.

Conditions
precedent.

In an action for the price of goods sold by sample, it is necessary to prove that they corresponded with the sample at the time of the sale (b); it is not sufficient to prove an usage of trade where samples are drawn without fraud, for the buyer to take the goods on receiving a compensation for the difference (c).

On an agreement to purchase 300 tons of Campeachy * logwood, of real merchantable quality, at 35*l.* per ton * 1622 and that such as might be determined to be not of real merchantable quality, might be rejected, it was held, that the vendee was bound to take so much as was of the sort described, at the contract price, although 16 out of 300 tons were not Campeachy logwood (d).

Where a purchaser orders several articles at the same time, though at separate prices, he may, it seems, consider the contract as entire, and refuse to accept some of the articles without receiving the rest (e). But if he accept

(a) *Tye v. Fynmore*, 3 Camp. 462. See also *Hayden v. Hayward*, 1 Camp. 180; *infra*, tit. *Work and Labour*.

(b) *Hibbert v. Shee*, 1 Camp. 113.

(c) *Ibid.*

(d) *Graham v. Jackson*, 14 East, 498.

(e) *Champion v. Short*, 1 Camp. 53; *supra*, 1616. Where the purchaser of lands took the growing crops at a valuation, and the purchaser entered, but the vendor could make no title to the land, it was held that the contract being entire he could not maintain *indebitatus assumpsit* for the crops (*Neal v. Viney*, Cor. Lord Ellenborough, 1 Camp. 471). So it has been held that a purchaser of two houses in distinct lots at an auction, may refuse to take one, if no title can be made to the other (*Chambers v. Griffiths*, 1 Esp. C. 150). But *qu.* for where different lots are bought at an auction, the agreements are separate, and cannot be declared on as one contract (*James v. Shore*, 1 Starkie's C. 426; *supra*, 1548. And see *Poole v. Shergold*, 2 Bro. C. C. 118; 1 Cox, 273, S. C.; 6 Ves. 726; Sugden's Treatise, 5th edit. 247). On the other hand, where an agent for the sale of horses sold to *A.* in one lot, and at an entire price, a horse belonging to *C.* and also a horse belonging to *B.*, warranting both to be sound, it was held that *A.* could not maintain *assumpsit* against *B.* for the unsoundness of the horse belonging to him, declaring as upon a sale of that horse, for the contract is entire. *Symonds v. Carr*, 1 Camp. 361; *Hort v. Dixon*, Selw. 101. [See *Smith v. Jones*, 15 Johns. 229.]

Where the plaintiff sold 60 coombs of rye to the defendant, at 14*s.* per coomb, to be delivered at or before Michaelmas, and the money to be paid on the delivery of the last rye, and the proof was that 50 coombs were delivered before Michaelmas, it was held,

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IV.

Stock.

one singly, he severs the contract, * and cannot object to receiving another of the remaining articles (*f*).

In an action for not accepting stock, the plaintiff, in addition to the contract, must prove that he was possessed of the stock in question (*g*), by the production of the Bank-books, or of an examined copy. Also that he either made an actual transfer, or attended at the Bank for the purpose, on the day appointed for the purpose, until the Bank-books were closed (*h*); and also (where the stock has not been transferred to the defendant,) that it has been transferred to some other person (*i*) within a reasonable time afterwards (*k*).

that though the agreement was entire for 60 coombs, yet that the parting it in the delivery made it in the nature of several contracts; for the one party sent it in, and the other accepted it, in pursuance of their agreement; and that if no other contract could be proved, it should be understood to be a partial agreement as to the 50 coombs, for the subsequent acts of the parties so expounded their contract, that it should be understood that the rye might be delivered by parts (Gilb. L. Ev. 191, cites Trials per Pais, 400). And where the plaintiff sold to the defendant 100 sacks of flour, at 94s. 9d. per sack, and the plaintiff delivered part, but refused to deliver the residue, the Court of K. B. is said to have held (contrary to the decision at Nisi Prius), that the vendor was entitled to recover for the part delivered. *Walker v. Dixon*, 2 Starkie's C. 281.

Where the defendant bargained and sold to the plaintiff 100 quarters of barley, to be delivered between harvest and Candlemas, where the plaintiff should appoint, at 16s. per quarter, and 2s. 6d. was paid at the bargain, and the residue to be paid at the times of delivery, according to the quantity; and upon the delivery of 19 quarters and a half (which were delivered for 20 quarters), the plaintiff paid 10l. only, but afterwards paid the other 6l. before action brought, it was held by Parker, C. J. that an action was maintainable for non-delivery of the residue; for delivering 19 quarters and a half without full payment was a dispensation by the defendant as to that quantity, and this did not excuse him from a delivery of the rest according to the agreement. *Peenam v. Palmer*, Gil. L. E. 194.

(*f*) Ibid. Contract for the sale of trees, to be paid for according to certain conditions; the purchaser took away part, but refused to take away the remainder, held that he had thereby abandoned the entirety of the contract, and that the executors of the vendor might recover the value of the trees taken. *Bragg v. Cole*, 6 Moore, 114.

(*g*) See the stat. 7 G. II. c. 8.

(*h*) *Bordenave v. Gregory*, 5 East, 107; *Heckscher v. Gregory*, 4 East, 607; *Callonel v. Briggs*, 1 Salk. 112.

(*i*) By the stat. 7 G. II. c. 8, s. 6.

(*k*) *Bordenave v. Gregory*, 5 East, 107. Some of the Judges in that case expressed a doubt whether the transfer ought not to be made at the next transfer day after the contract has been broken; but a majority were of opinion that it was sufficient to transfer

* In an action for not *replacing* stock, the plaintiff must prove the contract, his possession of the stock, his sale of it, and the advance of the product to the defendant, and he will be entitled to estimate his damages either at the current price of such stock on the day appointed for repayment, or on the day of the trial, or, as it seems, on any intermediate day; for had the defendant kept his promise the plaintiff might have received that price (*l*).

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Stock.

Indebitatus assumpsit will lie for goods bargained and sold where the vendee refuses to accept them, on a false assertion that the quality does not correspond with that which is specified in the contract (*m*). And in this form of action, the plaintiff will be entitled to recover the full price; whilst on a special count for not accepting the goods, he could not recover more than the damages proved to have been sustained (*n*). And it seems that the action for goods bargained and sold may be supported even after a re-sale of the goods by the vendor (*o*), although the plaintiff would be liable as for a wrongful conversion (*p*).

Goods bargained and sold.

In an action for goods sold and delivered, proof of * an actual or constructive delivery, it has been seen, is essential; the plaintiff must prove that he has either delivered the goods, or that he has enabled the defendant to remove them (*q*).

Goods sold and delivered.

* 1625

Proof that the vendor has recovered the value of the goods in an action against the carrier, is conclusive evidence of delivery (*r*).

Where the defendant, who had bought a stack of hay

within a reasonable time afterwards; but that if the stock bore a higher price at any intermediate transfer day, then that higher price should be the measure of damages.

(*l*) *Shepherd v. Johnson*, 2 East, 211. But see *McArthur v. Lord Seaforth*, 2 Taunt. 257.

(*m*) *Hankey v. Smith*, Peake's C. 42, n.

(*n*) *Ibid*.

(*o*) *Mertens v. Adcock*, 4 Esp. C. 251, Cor. Ellenborough, C. J. contrary to *Hore v. Milner*, Peake's C. 42, a. Cor. Ld. Kenyon, C. J. But see *Hagedorn v. Laing*, 6 Taunt. 162. 1 Marsh. 514.

(*p*) *Ibid*. And *qu*. whether *indebitatus assumpsit* for goods bargained and sold is maintainable where, by the conditions of sale, the vendor is entitled to re-sell them in case the vendee does not remove them before a day certain. *Hagedorn v. Laing*, 6 Taunt. 162. [1 Marsh. 514. S. C.]

(*q*) *Smith v. Chance*, 2 B. & A. 753; *supra*, 634.

(*r*) *Groning v. Mendham*, 1 Starkie's C. 299. [5 M. & S. 189. S. C.]

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IV.Goods sold
and delivered.

from the plaintiff, was prevented by a third person from removing it on account of an omission on the part of the plaintiff, it was held, that the plaintiff could not recover (*s*). And where *A.* agreed to sell goods to *B.*, and earnest was paid, and the goods were packed in cloths belonging to *B.*, but deposited on the premises of *A.*, till *B.* should send for them, but *A.* declared that they should not be removed until he was paid, it was held to be no delivery to *B.* (*t*).

A delivery to some person unknown, at a wharf, is not sufficient evidence of a delivery to bind the vendee, without showing a delivery to the wharfinger, or his agent, or that the goods were booked, or receipt taken, or that the goods were delivered in such a way as to render the wharfinger liable in case of loss (*u*).

If a vendee omit to take away goods within a reasonable time, the vendor may recover for warehouse-room (*x*); or may recover damages for not removing them (*y*), where he is prejudiced by the delay.

* 1626
Trove by ven-
dor on rescind-
ed contract.

* After a contract of sale, and delivery to the agent of the vendee, the sale may be rescinded by the assent of both parties (*z*); and therefore, where goods had been bought and delivered, and sent to the vendee's packer, and the vendee wrote to his agent to countermand all orders which had been given, and to re-deliver all goods which had been already delivered, and the vendors notified their assent to take back the goods, it was held that they could not be attached by a third person in the hands of the packer (*a*). But where the vendor proceeded to attach the goods in the hands of the packer, it was considered to be an election by him not to rescind the contract, and the vendee having become a bankrupt, the vendor, it was held, could not recover from the packer in trover (*b*).

Defence by
vendee.
Fraud.

It is, in general, a good defence by a vendee to an action for breach of contract, that the vendor was guilty of

(*s*) *Smith v. Chance*, 2 B. & A. 753.

(*t*) *Goodall v. Skelton*, 2 H. B. 316.

(*u*) *Buckman v. Levi*, 3 Camp. 414.

(*x*) 3 Camp. 426.

(*y*) *Greaves v. Ashlin*, 3 Camp. 426. It has been said that he cannot re-sell them. Ibid. Noy's Max. 87, 88. *Alexander v. Comber*, 1 H. B. 20. But see *Langfort v. Tiler*, Salk. 113.

(*z*) 5 T. R. 211.

(*a*) *Salte v. Field*, 5 T. R. 211.

(*b*) *Smith v. Field*, 5 T. R. 402. [See *Marston v. Baldwin*, 17 Mass. Rep. 612.]

fraud in the sale; as, that the plaintiff, without notice, employed puffers at a sale by auction to enhance the price by pretended competition, and that there was no real bidder but the defendant (c).

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IV.

Defence
by vendee.
Fraud.

And although where notice is given that a bidder will be employed on the part of the vendor, or where, even without notice, a bidder is employed, not with a view of enhancing the price generally, but to prevent a sale at an under-value, there is no fraud (d) (1), yet if the advertisement of sale stated that the sale * was to be *without reserve*, * 1627 it would be void if any person were to be employed to bid (e).

Where the purchaser deterred others from bidding, by stating that he had a claim against the owner, and had been ill used by him, the sale was held to be void (f).

Where a bill was given for the price of goods, a total, or even partial, failure, from the fraud of the vendor, is a bar to the action (g), provided the vendee has repudiated the contract (h).

So, although the general rule of law be "*caveat emptor*," yet if the vendor of property give a false description of it, the vendee may rescind the contract; as, if an estate

(c) [*Moncrief v. Goldsborough*, 4 Har. & M'Hen. 282.] *Howard v. Castle*, 6 T. R. 642. *Buxwell v. Christie*, Cowp. 395; 3 Ves. jun. 625. But it seems that the ground of the decision was, that there was no real bidder. (Per Lord Rosslyn, in *Conolly v. Parsons*, 3 Ves. jun. 625, n.) And it is said, that if there be real bidders at a sale, it must be supported, although the bidding immediately previous to that of the purchase was fictitious. *Smith v. Clarke*, 12 Ves. 477.

(d) *Smith v. Clarke*, 12 Ves. 477.

(e) *Meadows v. Tanner*, 5 Madd. 34.

(f) *Fuller v. Abrahams*, 3 B. & B. 116.

(g) *Lewis v. Cosgrave*, 2 Taunt. 2; *supra*, 281.

(h) *Ibid.* *Secus*, where he affirms it by retaining part of the consideration. *Attibee v. Bamford*, 3 Starkie's C. 175.

(1) [In *Millar v. Campbell*, 3 Marsh. 526, the Court of Kentucky held that if at an auction a puffer is employed, by whom the property sold is run up to an unreasonable price, yet the fraud cannot be inquired into in an action for the purchase money against the vendee: An action on the case, or a bill in equity is the proper remedy. So in *Jenkins v. Hogg*, 2 Const. Rep. 821, the Court of South Carolina held that the employment of a person to bid at a public sale on the part of the vendor does not vitiate the sale; but the purchaser will be compelled to complete his purchase, though he had no notice that such person was employed, and though the price was by such means carried beyond the real value.]

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IV.

Defence.

is stated to be but one mile from a borough town, and it turns out to be between three and four (i).

So where the estate was described to have lately undergone a thorough repair, whereas it was in a complete state of ruin, and ordered to be pulled down by the district surveyor (k).

If an annuity be subject to redemption, the purchaser is not bound to complete his contract, if the auctioneer do not describe it as redeemable (l).

* 1628
Fraud.

Where the estate is described to contain a specified number of acres, it seems, in the first place, that this * must be understood of statute, and not of customary, measure, unless they be so described (m); and that it would be a good defence at law to show that the estate did not contain the stipulated quantity of land. But if the estate be described as containing so many acres *by estimation*, be the same *more or less*, or by words to that effect, it seems that a small variance would not be material in the absence of fraud (n) (1).

(i) *Duke of Norfolk v. Worthy*, 1 Camp. 337; *Fenton v. Brown*, 14 Ves. jun. 144; *Trower v. Newsome*, 3 Mer. 704.

(k) *Loyes v. Rutherford*, K. B. May, 1809; Sugden's Treatise, 273. But see *Belworth v. Hassell*, 4 Camp. 140.

(l) *Coverley v. Burrell*, 5 B. & A. 287. But it seems, that if a public act authorizing the raising of money by annuities made them redeemable, such a notice would be unnecessary. *Coverley v. Burrell*, 2 Starkie's C. 295.

(m) *Wing v. Earle*, Cro. Eliz. 267; *Noble v. Durrell*, 3 T. R. 271; *Hockin v. Cooke*, 4 T. R. 314; *Master of St. Cross v. Lord Howard de Walden*, 6 T. R. 338; *supra*, 455, 6.

(n) See *Day v. Fynn*, Ow. 133; Sugden's V. & P. 281, and the cases there cited. It seems, that notwithstanding these words, the purchaser will be entitled to an abatement in equity, if the deficiency be considerable (*Hill v. Buckley*, 17 Ves. 394). But in the late case of *Winch v. Winchester* (1 Ves. & B. 375), where the estate was stated to contain by estimation 41 acres, be the same more or less, and it contained in fact but between 35 and 36, the Master of the Rolls decided against a claim by the purchaser for an abatement.

(1) [On this subject, see *Fleet v. Hawkins*, 6 Munf. 188. *Tunno v. Fludd*, 1 M'Cord, 122. *Talbot v. Mason*, 2 ib. 440. *Glover v. Smith*, 1 Desauss. 433. *Wainwright v. Read*, *ibid.* 573. *Cannon v. Mitchell*, 2 ib. 320. *Pringle v. Wittens*, 1 Bay, 259. *Gray v. Handkinson*, *ibid.* 278. *Pringle v. Samuel*, 1 Littell's Rep. 45. *M'Conn v. Delaney*, 3 Bibb, 46. *Young v. Craig*, 2 Bibb, 270. *Shelby v. Smith*, 2 Marsh. 513. *Bond v. Jackson*, 1 Hayw. (Tenn.) Rep. 189. *Thomas v. Perry*, 1 Peters' Rep. 49. *Dagne v. King & al.* 1 Yeates, 322. *Glen v. Glen*, 4 Serg. & Rawle, 488.]

So it is fraudulent to give such a false description of the goods in the catalogue of sale as is likely to enhance the price, as by falsely describing them in the catalogue to be "the property of a gentleman deceased, and sold by order of his executor (o)."

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IV.

Defence.
Fraud.

Where the plaintiff's agent sold a picture to the defendant as a Claude, refusing to disclose the name of his principal, but knowingly suffered the defendant to buy the picture, under the impression that it was the property of another person, Lord Ellenborough held that the sale was void, through fraud, even though the picture were a real Claude (p).

Where a tenant sold his interest in the premises by auction, without informing the vendee that the landlord had, the day before the sale, given notice of re-entry, according to the terms of the lease, if the * premises were not put in repair within three months, and the vendee was afterwards ejected, it was held to be a fraudulent concealment, and that the vendee was entitled to recover his deposit from the auctioneer (q). * 1629

And where a lease, containing the usual covenants to repair, is sold by auction, if any of the demised buildings have been pulled down before the sale, the vendee may rescind the contract, although the buildings pulled down be not described in the particulars of sale (r).

And although the conditions of sale provide that a mistake in the particular shall not vitiate the contract, the stipulation does not extend to a wilful misdescription calculated to enhance its value (s).

But it seems that where a vendee knows the description to be false he cannot take advantage of it either at law or in equity (t).

The purchaser of goods by sample has a right to inspect the whole of the bulk for the purpose of comparison; and if the vendor refuse such inspection, it is a good defence to the action (u), although the vendor afterwards request

(o) Per Lord Mansfield, C. J. in *Bexwell v. Christie*, Cowp. 395.

(p) *Hill v. Gray*, 1 Starkie's C. 434.

(q) *Stevens v. Adamson*, 2 Starkie's C. 422.

(r) *Granger v. Worms*, 4 Camp. 83.

(s) *Duke of Norfolk v. Worthy*, 1 Camp. 340. And see *Schneider v. Heath*, 3 Camp. 506.

(t) See *Dyer v. Hargrave*, 10 Ves. jun. 505. But he may still sue upon an express warranty.

(u) *Longmer v. Smith*, 1 B. & C. 1. Note, the payment was to be made by a banker's bill, and an usage to permit the inspection

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IV.

the vendee to inspect the bulk ; for the contract is wholly rescinded (x) (1).

Defence.
Payment.
* 1630

Payment in a bill, which is dishonoured, and which remains inoperative in the hands of the vendor, does *not preclude the vendor from recovering on the original consideration (y).

Waver.

The vendor of goods, on the vendee's objecting to their quality, and refusing to accept them, requests the vendee to sell them for him ; this is evidence of a waver of the contract, and the Jury cannot take into their consideration whether, in making that request, the vendor mistook the law (z).

Negligence.

Where a vendor receives an order to forward goods to

of the bulk was proved ; but the Court intimated that the purchaser had a right, independent of any particular usage, to inspect the bulk.

(x) Ibid.

(y) [*Pierce v. Drake*, 15 Johns. 475.] *Fry v. Hill*, 7 Taunt. 397. The purchaser paid for the goods, by a bill at one month after sight for a larger sum than the price, the vendor paying the difference ; the bill was dishonoured ; and held, that the vendor might recover the price of the goods. Ibid. See also *Williams v. Smith*, 2 B. & A. 496. The purchaser of goods to be paid for by a bill on his agent, who has no convertible funds in his hands, is not discharged by a renewal of the bill without notice (*Clarke v. Noel*, 3 Camp. 411). But where goods were sold, "without recourse on the buyer in case of non-payment," for a bill which the vendee knew to be worth nothing, it was held that the vendor could not maintain *assumpsit* for the value, but must sue in *tort* (*Read v. Hutchinson*, 3 Camp. 352). Where a bill drawn and accepted by two other persons, was indorsed in blank in payment of a greater amount than the price of the goods, held that the vendor having lost the bill, could not sue the vendee for the goods, or on the bill. *Champion v. Terry*, 3 B. & B. 294.

(z) *Gomery v. Bond*, 3 M. & S. 378 ; *Bilbie v. Lumley*, 2 East, 469 ; *Brisbane v. Dacres*, 5 Taunt. 143, *supra*, 112. A contract of sale cannot be rescinded by the act of the parties where the rights of third parties have intervened. *Smith v. Field*, 5 T. R. 402 ; *supra*, 1626.

(1) [Where an article capable of inspection is purchased, as rice, cotton, &c. the purchaser is considered as having purchased on his own judgment : But in South Carolina, the article must correspond throughout with the sample exhibited ; and where the external part of a bag of cotton appears good, and the interior is injured by water having been poured upon it, the purchaser will be entitled to damages. *Rose v. Beatie*, 2 Nott & M'Cord, 536. Where it is usual to examine rice or other produce before shipping it, and the purchaser refuses or neglects this precaution, he takes the risk upon himself. *Vanderhorst v. M'Taggart*, 2 Bay, 498. Vid. *Infra*, 1663.]

the vendee, at another sea-port, by a common sea carrier, who it is notorious has limited his responsibility as to parcels of a certain value, it is his duty to enter the goods and pay for them accordingly, in order to ensure the responsibility of the carrier for the safe delivery, and if the goods be lost in consequence of neglect to do so, the vendor cannot recover the price (a).

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IV.

Defence.

* No action lies where the consideration, in respect of which recompense is claimed, is in its nature illegal or immoral (b). * 1631

The smuggling of prohibited goods into this country cannot be made the foundation of an action for not bringing the goods at all, or not bringing them in a perfect state (c); nor will an action lie for the freight of goods in an illegal voyage (d); or on a policy of insurance effected on an illegal voyage (e); or for goods to be carried to the East Indies, and there disposed of by illegal and clandestine traffic (f); or for the price of bricks under the statutable size (g); or for running an illegal race (h); or for printing books without the printer's name on the first and last leaves, as required by the statute (i); or for printing and publishing a periodical work, part of which is printed on stamped paper, and distributed as newspapers, the printer not having lodged an affidavit at the stamp-office,

(a) *Clarke v. Hutchins*, 14 East, 475.

(b) If A. agree to give B. money for doing an illegal act, B. cannot, although he do the act, recover the money by action (*Webb v. Bishop*, Gloucester Lent Assiz. 1731, Cor. Reynolds, C. B. B. N. P. 16. 132). It is remarkable that Dr. Paley, in his *Moral Philosophy*, intimates that a person who has promised to reward another for the commission of a crime, is bound to perform his promise after the crime has been committed, because, he says, the sin and mischief are over, and no reason remains why the promise should not be performed; but surely the question is, upon the principle of general utility, whether the general and universal performance of such contracts does not encourage their frequency; and whether it is not better on the whole for mankind that they should never be performed.

(c) *P. C. Wilkinson v. Loudonsack*, 3 M. & S. 117.

(d) *Wilkinson v. Loudonsack*, 3 M. & S. 117.

(e) *Toulmin v. Anderson*, 1 Taunt. 227.

(f) *Lightfoot v. Tenant*, 1 B. & P. 551.

(g) *Law v. Hodson*, 11 East, 300. 2 Camp. 147. [*Wheeler v. Russell*, 17 Mass. Rep. 258. S. P.]

(h) *Coates v. Halton*, 3 Starkie's C. 61.

(i) *Ibid.* in the note.

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IV.

Defence.
Illegality.

* or had his name and abode printed on the publication, as required by the statute (*k*).

An innkeeper cannot recover against a candidate at an election for provisions furnished to the voters of a borough, after the *teste* of the writ (*l*).

The owner of a ship employed in the East India Company's service cannot recover on a contract for the sale of the command of the ship, made without the knowledge of the East India Company (*m*); or for the sale of any office which is not salable by law (*n*).

An agreement for the transfer of a ship which does not recite the certificate of registry is void (*o*).

In the case of *Hodgson v. Temple* (*p*), it was held, that a person who sold goods, knowing that the purchaser intended to apply them in an illegal trade, was entitled to recover the price, if he yielded no other aid to the transaction than by selling the goods and obtaining permits for their delivery to the agent of the purchaser. This decision seems, however, to be directly opposed in principle to that of *Langton v. Hughes* (*q*), where it was held that a plaintiff could not recover the price of drugs sold for the purpose of being illegally used in brewing beer; and to the case of *Lightfoot v. Tenant* (*r*), where it was held that a * person who sold goods, in order that they might be exported to a place to which by law they could not legally be exported, could not recover the price.

* 1633

But on an action brought for washing the defendant's clothes, it was held to be no defence that the defendant was a prostitute, and that *some* of the dresses were of an expensive kind, and were used, to the knowledge of the plaintiff, with a view to prostitution; for it was necessary that she should have clean linen, and the Court could not take into consideration which of the articles were used for an improper purpose, and which were not (*s*).

(*k*) *Marchant v. Evans*, 2 Moore, 14. [8 Taunt. 142. S. C.]

(*l*) *Ribbans v. Crickett*, 1 B. & P. 264.

(*m*) *Blachford v. Preston*, 8 T. R. 89.

(*n*) *Ibid.* and *Garforth v. Fearon*, 1 H. B. 327.

(*o*) *Biddell v. Leeder*, 1 B. & C. 327.

(*p*) 5 Taunt. 181; 1 Marsh. 5.

(*q*) 1 M. & S. 593. And see 3 B. & A. 185. [1 Taunt. 6.]

(*r*) 1 B. & P. 551. It is no defence to an action for goods delivered to a master of a vessel to be sold by him, that they were exported without paying duty, unless the evasion formed part of the contract. *Callin v. Bell*, 4 Camp. 183.

(*s*) *Lloyd v. Johnson*, 1 B. & P. 340. *Vide supra*, 1521. Where

And where the contract is illegal it makes no difference that the parties thought that they were acting legally, for their apprehension does not alter the nature of the contract which the Court is called on to enforce (t).

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IV.

Defence.
Illegality.
Fraud.

Where there is a *latent* defect in the subject of sale, known to the vendor, and he uses any means or artifice to conceal that defect, this is a fraud which will avoid the contract, even although by the written terms of contract the article is sold with all faults (u). But according to the opinion of Lord Ellenborough, in the case of *Baglehole v. Walters*, where an article is * sold with all faults, * 1634 it is quite immaterial how many belong to it with the knowledge of the seller, unless he use some artifice to disguise them, and to prevent their being discovered by the purchaser (x) (1).

Hence it seems that in such a case, in order to repel an action on the contract, or to enable a vendee to recover his deposit, proof of the *scienter*, and of actual fraud on the part of the vendee, is essential. And for the purpose of proving fraud, the vendee is not confined to the written contract made at the time of the sale, but may give in evidence previous and contemporary representations made for the purpose of putting the vendee off his guard and preventing him from being vigilant (2).

a factor sold a piece of manufactured tobacco consigned to him from Guernsey, without having entered himself in the Excise-office as a dealer in tobacco, and having no license as such, it was held that he might maintain an action for the value of the goods, although they were sent to the defendant without a permit; there being no fraud on the revenue, but at most a breach of the revenue laws, protected by penalties. *Johnson v. Hudson*, 11 East, 180. But note, that the Court doubted whether the plaintiff could, under the circumstances, be considered to be a *dealer* within the statute.

(t) *P. C. Wilkinson v. Loudonsack*, 3 M. & S. 126.

(u) *Baglehole v. Walters*, Cor. Lord Ellenborough, 3 Camp. 154; *Schneider v. Heath*, Cor. Mansfield, C. J. 3 Camp. 506; *Pickering v. Dowson*, 4 Taunt. 779; *Jones v. Bowden*, *ibid.* 847. [See 5 Johns. 411, *note*.]

(x) 3 Camp. 154. Lord Kenyon, in the previous case of *Mellish v. Motteux*, Peake's C. 115, held mere knowledge on the part of the vendor to be sufficient. *Supra*, 468. [See *Infra*, 1662, 3.]

(1) Where the vendor, at the time of the sale, declared that the purchaser bought subject to every defect, and the appearance of the slave sold indicated unhealthiness, it was held that the purchaser was not entitled to recover back the price on the ground of unsoundness, although a fair price was paid, and there was no proof that the purchaser had knowledge of the vendor's declaration. *Limehouse v. Gray*, 1 Const. Rep. 73.]

(2) [Vide *Infra*, 1646, and *notes*.]

PART
IV.Proof by
Vendee of
Goods.

An action by the vendee of goods is either on a special contract for not delivering the goods, or of trover (y), for a conversion; or of money had and received (z) upon a rescinded contract; or upon a warranty (a).

The vendee of goods in an action against the vendor, for not delivering the goods according to his contract, must prove, 1st. The contract; 2dly. The performance of conditions precedent; 3dly. The damage sustained.

* 1635
Contract.

The engagement must be mutually binding, or it is null. *A.* gives *B.* till four o'clock to decide whether he will purchase the goods of *A.*, and *B.* within the time signifies his assent, yet *A.* is not bound (b) (1). But where *A.* by letter offered to sell *B.* certain goods, receiving an answer by return of post, and the letter being misdirected, the answer, notifying *B.*'s acceptance, * did not arrive so soon by two days as it would have done had *A.*'s letter been properly directed, it was held that the contract was complete the moment the offer was accepted, and that *B.* was entitled to recover for breach of contract (c) (2).

(y) *Infra*, 1635.(z) *Infra*, 1646.(a) *Infra*, 1660.

(b) *Cooke v. Oxley*, 2 T. R. 653. [See *Tucker v. Woods*, 12 Johns. 190.]

(c) *Adams v. Lindsell*, 1 B. & A. 681. See also *Humphries v. Carvalho*, 16 East, 45. A broker on Saturday sold goods of the defendant to the plaintiff at a stipulated price, subject to the plaintiff's approval of the quality on the Monday following, and sent the bought-note to the plaintiff on the Saturday, marked with the words "quality to be approved on Monday," but did not send the bought-note to the defendant then, because he had met him, and informed

(1) [Where *A.* offered to purchase of *B.* two or three hundred barrels of flour, to be delivered at Georgetown (D. C.) by the first water, and to pay \$9.50 per barrel, and to the letter, containing this offer, required an answer by the return of the waggon by which the letter was sent—and the waggon was at that time in *B.*'s service conveying flour from his mill to Harper's Ferry, near to which place *A.* then was—and the offer was accepted by *B.* in a letter sent by the first regular mail to Georgetown, and received by *A.* at that place, but no answer was ever sent to Harper's Ferry—it was held that this acceptance, communicated at a place different from that indicated by *A.*, imposed no binding obligation on him. *Eliason & al. v. Henshaw*, 4 Wheat. 225.]

(2) [Where *A.* wrote by mail to *B.* inquiring on what terms he would insure *A.*'s vessel, and *B.* wrote by mail in reply that he would insure at a certain rate, and on the next day wrote another letter retracting his offer; and *A.*, having received the first letter, put into the post-office an answer acceding to the terms proposed, before he had received *B.*'s second letter—it was held that there was not an agreement to insure. *McCulloch v. Eagle Insurance Company*, 1 Pick. 281.]

If goods be sold by sample, but the sale-note makes no mention of the fact, the remedy is by action of deceit (*d*).

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As it is sufficient in a declaration for not delivering goods on request, to aver a request by the plaintiff, and that he was ready and willing to pay the defendant for the same, and a refusal by the defendant to deliver, without averring an actual tender of the price (*e*), so a demand of the delivery of the goods sold is sufficient proof of the averment that the plaintiff was ready and willing (*f*), although the demand was not made by the plaintiff himself but by his foreman (*g*) (1).

Condition
precedent.

In an action for the non-delivery of goods to be paid for by a bill, the plaintiff must prove the tender of a bill; but no evidence on the part of the defendant * is admissible to prove that by bill was meant an *approved* bill (*h*). And even if the contract be to pay by an *approved* bill, it must be taken to mean a bill to which no reasonable objection could be made (*i*). * 1636

In an action for not transferring stock (*k*), the plaintiff must prove, in addition to the contract, that the defendant was possessed of the stock; that the plaintiff paid or tendered the price; and that he attended at the Bank for the

him of the contract on the same day; the plaintiff not having signified his disapproval of the contract on Monday, the broker sent the sold-note to the defendant on Friday, with the words "quality to be approved of on Monday" struck out, which note the defendant returned in twenty-four hours, which by the custom of the trade signified his disaffirmance of the contract as far as in him lay; held, that at any rate the defendant could no longer disaffirm it after Monday.

(*d*) *Meyer v. Everth*, 4 Camp. 22.

(*e*) *Rawson v. Johnson*, 1 East, 203. The measure of damages is the difference between the contract price, and that which goods of that description bore about the time appointed for delivery. *Gainsford v. Carroll*, 2 B. & C. 624; *Leigh v. Paterson*, 2 Moore, 568. 8 Taunt. 540.

(*f*) *Squier v. Hurst*, 3 Price, 68; *Wilkes v. Atkinson*, 1 Marsh. 512.

(*g*) *Squier v. Hurst*, 3 Price, 68.

(*h*) *Hodgson v. Davies*, 2 Camp. 530.

(*i*) *Ibid.* And see *Adam v. Richards*, 2 H. B. 573; *Thirshy v. Helbot*, 3 Mod. 272.

(*k*) As to *variance* from the contract, see *Wickes v. Gordon*, 2 B. & A. 335; *supra*, 1567.

(1) [In an action by the vendee for breach of contract by the vendor in not delivering the article, the measure of damages is the price of the article at the time of the breach of the contract, and not at any subsequent period. But this rule, it seems, will not apply to a case where advances have been made by the vendee under the contract. *Shepherd & al. v. Hampton*, 3 Wheat. 200.]

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IV.

Trover.

dor, * and he refuses it, the vendee may seize the goods, or have an action against the vendor for detaining them (y).

So if a day be fixed for the delivery, and a future day be appointed for payment, the property vests in the vendee, and trover may be maintained without any tender of the price (z).

If there be neither earnest, part-payment, part-delivery, or agreement in writing, the sale is void by the statute of frauds (a) ; as, if one agree to buy sheep, and to take them away at a certain hour, but no money be paid, nor sheep delivered, no property passes, and the owner may re-sell them (b).

Capability of
delivery.

The doctrine that an absolute right of property and of possession passes to the vendee, without actual delivery, assumes that the subject of sale is definite and ascertained so as to be *capable* of immediate delivery.

The property in a chattel when made does not pass by a contract of sale, even although the value be paid, unless it be in existence at the time (c) of the contract.

* 1640

* It is a very general rule, that whenever any thing remains to be done on the part of the seller, as between him and the buyer, previous to the delivery, a complete present right of property does not attach (d) (1) and therefore,

In Buller's N. P. 50, the law is thus stated : " If a man comes to a shop to buy goods, and they agree on the price and the day of payment, and the buyer takes them away, *detinue* will not lie, because the property was changed by a lawful bargain ; but if they agree for present money, and the buyer take the goods away without payment, *detinue* lies, because the property is not altered. (Cro. Eliz. 867). So if a man sell goods on payment of money on a day to come, and the money be paid, and the goods not delivered, *detinue* lies, because the property is in the buyer. (12 Mod. 345.) But earnest does not alter the property, but only binds the bargain ; and therefore if no other time for payment be appointed, the money must be paid on fetching away the goods. The earnest gives the party a right to demand, but a bare demand without payment is void. 1 Salk. 113." [See *De Foncleare v. Shottenkirk*, 3 Johns. 170.]

(y) 2 Bl. Comm. 448.

(z) Sheppard's Touchstone, 224 ; *supra*, 1637, 1638, note (x).

(a) *Alexander v. Comber*, 1 H. B. 9. i. e. where the value is 10*l*.

(b) *Ibid*.

(c) *Mucklow v. Mangles*, 1 Taunt. 318 ; *supra*, 1485 ; Noy's Max. c. 42 ; Hob. 41, 42. [See *Fonville v. Casey*, *Supra*, 1494, note (1).]

(d) Per Lord Ellenborough, in *Hanson v. Meyer*, 6 East, 614. And see *Zagury v. Furnell & another*, 2 Camp. 240.

(1) [A. bought timber of B. under an agreement which provided that A. was to pay for it, at the measurement in N. York where it

where the vendor agreed to sell all his stock, lying in papers at the warehouse of a third person, at a certain price, and it was agreed that the weight should be afterwards ascertained, after which the vendor gave a note to the vendee, directing the warehousekeeper to weigh and deliver the starch to the vendee, and part was weighed and delivered accordingly, it was held that this did not transfer to the vendee the property in the rest, which had not been weighed and delivered, the weighing of the starch being, by the terms of the contract, a condition which was to precede the absolute vesting of the property (e).

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delivery.

* And where the goods sold are part of a larger stock, * 1641

(c) *Hanson v. Meyer*, 6 East, 614. See also *Withers v. Lyss*, 4 Camp. 237. [and Mr. Howe's note.] So where a quantity of turpentine in casks was sold in lots at an auction, at a certain price per cwt., each cask, except the two last, being marked at a certain weight, at which they were to be taken by the buyer, the two last lots being reserved to fill up the rest, and being on that account sold at uncertain quantities, and after the sale some of the casks were filled up, but the filling up of the rest was not completed, when the whole was consumed by fire, it was held that the property in those casks which had been filled up was transferred to the buyer, but that those which were not filled up remained the property of the seller (*Rugg v. Minett*, 11 East, 210). So, where 50 out of 90 tons of Greenland oil were sold, and an order was given by the seller for the delivery of the oil to the buyer, and it was found as a fact, in a case reserved for the opinion of the Court, that before Greenland oil is delivered, it is the constant custom to have the casks searched by a cooper employed by the seller, and for a broker on behalf of both buyer and seller, to attend and make a minute of the foot-dirt and water in each cask, and that then each cask is filled up at the seller's expense, and delivered in a complete state; and that those things had not been done, the Court held that the property in the oil did not vest in the vendee. *Wallace v. Breeds*, 13 East, 522.

was delivered and inspected, and also to pay the fair market price in N. York, when delivered, and that the amount should be indorsed on notes which he held against B. and if the amount exceeded that of the notes, he should pay the balance to B. It was held that this was a mere *executory* agreement, and that A. could not maintain trover against a third person for converting it. *McDonald v. Hewett*, 15 Johns. 349. A. holding a note against B. went to his shop and told him that he came to take goods in payment; B. handed him such articles as he pointed out, mentioning the prices — A. marked such as he approved, and laid them aside; and then, saying he would go for a porter to remove them, left the shop without receiving a bill of parcels, or stipulating a time of payment, or tendering the note to B. who immediately shut up his shop and the next morning assigned all his property to his creditors: It was held that A. had not acquired the property of the goods. *Dutikh v. Ritchie*, 1 Dallas, 171.]

PART
IV.Trover.
Transfer by
delivery.

and a separation is necessary previous to delivery, no property passes until the separation is complete (*f*) (1).

The property in goods may also pass under a contract of sale by delivery, without payment, so as to divest the vendor of his lien for the price (*g*).

And a partial delivery is sufficient to vest the property, where there is no intention manifested to separate the one part from the rest. Thus the delivery of part of a cargo of goods, where there appears to be no intention, either previously or at the time of delivery, to separate that part from the rest, is in law a delivery of the whole cargo (*h*).

And where, from the nature of the case, an actual delivery is impossible, a symbolical delivery is sufficient. Thus where an engineer made a symbolical delivery to a canal company, to whom he was indebted, of timber and other materials on their wharf, by the delivery of a half-penny, it was held that the property was thereby transferred (*i*).

- * 1642 * So goods may be transferred by a delivery of the bill of lading (*k*). And where the goods are in the possession

(*f*) By a sale of oil out of a merchant's stock, consisting of large quantities in different cisterns, no property passes without a separation of the part sold from the rest of the stock. *White v. Wilks*, 1 Marsh. 2. 5 Taunt. 176. And see *Austen v. Craven*, 4 Taunt. 644; *Shepley v. Davis*, 5 Taunt. 617. [1 Marsh. 252. S. C.] *Busk v. Davis*, 2 M. & S. 397. These cases seem to overrule that of *Whitehouse v. Frost*, 12 East, 614.

(*g*) *Slubey v. Hayward*, 2 H. Bl. 504; *Hammond v. Anderson*, 1 N. R. 69. *H.* at Bristol sells wool to *J.* for bill at nine months; no bill is drawn, but samples are taken, and several bags are delivered to sub-purchasers; *J.* re-sells the residue to *G.*, and *G.* transmits the delivery-order from London on the 16th to *H.* at Bristol; on the 21st, *J.* becomes insolvent; *H.* not having before then signified his dissent, the property is vested in *G.* *Green v. Haythorne*, 1 Starkie's C. 447.

(*h*) *Slubey v. Hayward*, 2 H. B. 504.

(*i*) *Manton v. Moore*, 7 T. R. 67.

(*k*) *Supra*, 308. *Hibbert v. Carter*, 1 T. R. 745; *Lempriere v. Pasley*, 2 T. R. 485. If the bill be special to deliver the goods to *A.* for the use of *B.*, the property is vested in *B.*; but if it be general to *A.*, and the invoice only shows that it is to the use of *B.*, the

(1) [In an action for goods bargained and sold, where a contract was made for twelve thousand bricks to be received at the vendor's kiln, and the purchaser took away eight hundred of them, saying he would take the remainder the next week, but never called for them; it was held that the sale was complete, and that the action well lay for the price of the whole, though the vendor had never separated them from the rest of the kiln. *Damon v. Osborn*, 1 Pick. 470.]

of a wharfinger, and after a contract for the sale a written order for the delivery is communicated to the wharfinger, and assented to by him, the property passes to the vendee, although no actual transfer be made in his books (2) (1).

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property is in *A.*, and *B.* has but a trust. *Evans v. Marlett*, 1 Ld. Raym. 271; 3 Salk. 290; 12 Mod. 156.

(1) *Lucas v. Dorrien*, 7 Taunt. 278. 1 Moore, 29. But where goods were left in the vaults of a warehouse-keeper by agreement till the vendee could conveniently remove them, and the vendee marked them, and the goods remained in the warehouse a considerable time, but no notice of the sale was given to the warehouse-keeper, it was held that the property passed to the assignees of the vendor, who became bankrupt after the sale (*Knowles v. Horsefall*, 5 B. & A. 134). *Secus*, where the goods are left in the vendor's custody until they can be shipped off. *Flinn v. Matthews*, 1 Atk. 185. And see *Thackthwaite v. Cock*, 3 Taunt. 487.

A. sells goods to *B.* and gives a written order on the wharfinger to weigh, deliver, transfer and release, &c. *B.* sells to *C.* and delivers to him a written acknowledgment obtained from the wharfinger, that he had transferred the goods to the account of *C.*, *C.* pays for the goods, *B.* having stopped payment, *A.* gives notice to the wharfinger not to deliver the goods to *B.*, the wharfinger cannot, after his acknowledgment, insist that he holds the goods as the agent of *A.* *Hawes v. Watson*, 2 B. & C. 540; see also *Harman v. Anderson*, 2 Camp. 243; *Stoveld v. Hughes*, 14 East 308; *Stonard v. Dunkin*, 2 Camp. 344; *Cumming v. Brown* 9 East, 506. 1 Camp. 104.

(1) [Where goods are on board a vessel, an indorsement and delivery of the bill of lading are equivalent to an actual delivery of the goods. *Buffington & al. v. Curtis & al.* 15 Mass. Rep. 526. See also *Chandler & al. v. Belden*, 18 Johns. 157. A mere indorsement, however, of a bill of lading, without a delivery, does not transfer the property of the goods, 15 Mass. Rep. *ubi sup.* But, it seems, that a delivery of an indorsed bill of lading to a third person, for the use and benefit of the vendee, and his assent thereto, amount to a constructive delivery—Or the inclosing of such bill in a letter, directed to the vendee and put into the post-office, *ibid.*

It is not necessary in order to effect a transfer of bulky articles, that there should be a manual delivery of them: Possession may be inferred from the vendee's undertaking to deal with them as his own, as by indorsing orders upon a bill of lading. *Rice v. Austin*, 17 Mass. Rep. 197. Where a sale was made of logs lying in an enclosed space in a river, and the vendor's agent went within sight of them with the vendee and showed them to him, it was held that this was sufficient to transfer the property. *Jewett v. Warren*, 12 Mass. Rep. 300. See also *Beaumont v. Crane*, 14 Mass. Rep. 400. *Leedom v. Philips*, 1 Yeates, 529. Vol. II. 611, note (1).

When the same goods are sold to two different persons, by conveyances equally valid, he, who first lawfully acquires possession, will hold them against the other. *Lanfear v. Sumner*, 17 Mass. Rep. 110.]

PART
IV.

Trove.

And where by a particular custom the vendor of goods is to pay warehouse rent for two months after the sale, but gives the usual order for the delivery to the purchaser within the two months, the property from that time vests in the vendee, and he is liable to any subsequent loss (m).

Where goods are lodged with the West India Dock Company, it seems that a delivery of the indorsed dock-warrant and certificate from the seller to the buyer, operates as a transfer of the goods (n).

* 1643
Conditional
delivery.

* A conditional delivery is not sufficient to vest the property in the vendee. Where goods are sold, to be paid for on delivery, and a servant delivers them without receiving the money, the property is not altered (o).

Fraud.

And if goods be obtained by false pretences, under colour of purchasing them, the property is not altered by a delivery (p) (1).

(m) *Greaves v. Hepke*, 2 B. & A. 131.

(n) *Zwinger v. Samuda*, 1 Moore, 12; 7 Taunt. 265. *Lucas v. Dorrien*, 1 Moore, 29; 7 Taunt. 278. *Spear v. Travers*, 4 Camp. 251. Goods being entered in the books of the West India Dock Company in the name of A., he received the usual cheque for them, which, having sold the goods to B., he indorsed and delivered to him; B. sold the goods to C., and delivered to him the cheque or certificate indorsed by A., and C. gave B. his acceptance in payment, which was afterwards dishonoured; C. transferred the cheque to D. as a security for a debt which he owed him, and afterwards A. obtained possession of the goods by means of a duplicate cheque or certificate obtained from the West India Dock Company, by means of a false representation that the original was lost; A. had paid rent for the goods down to that time: it was held that D. was entitled to recover in trover against A.

(o) Per Bayley, J. in *Bishop v. Shillito*, 2 B. & A. 329, n. *Vide supra*, 1485, note (e). [*Marston v. Baldwin*, 17 Mass. Rep. 606.]

(p) *Noble v. Adams*, 7 Taunt. 59. 2 Marsh. 366. Gibbs, C. J. in summing up to the Jury, said, that if the Jury thought that the plaintiff went down to Scotland, having formed a deliberate plan to put off *bad bills* for valuable merchandizes, knowing the same would never be paid for, and intending thereby to abscond with the goods, or to throw them into an immediate bankruptcy, or to pass them over to a particularly favoured creditor, he was of opinion that the plaintiff had been guilty of a fraud, and that the sale would not change the property. *Note*, that in the above case the action was against the wharfinger in whose hands they had been deposited by the plaintiff.

In the case of *Parker v. Patrick* (5 T. R. 175), where goods obtained from A. by false pretences had been pawned to B. for a valuable consideration, and A. obtained possession of the goods, it was held that B. might maintain trover for them. See *Horwood v. Smith*, 2 T. R. 750.

(1) [To entitle a vendor to rescind a contract for the sale of

If the vendee, by a false representation, obtain possession of goods with a preconceived design not to pay for them, no property passes (q); and whether he * had in fact formed such a design, is a question for the Jury (r).

PART
IV.

* 1644

(q) *Earl of Bristol v. Wilmere*, 1 B. & C. 514. The contract was for ready money; but the vendee obtained possession of the goods from the servant of the vendor, by delivering him a cheque upon a banker, which he represented to be as good as money, but in fact he had then overdrawn his account for some months, and payment was refused; held that the question, whether the sale was vitiated by fraud, depended on the fact whether the vendee obtained possession of the goods with a preconceived design not to pay for them. See *Noble v. Adams*, 7 Taunt. 59; *Parker v. Patrick*, 5 T. R. 175; *Gladstone v. Hadwen*, 1 M. & S. 517; *R. v. Jackson*, 3 Camp. 370; *R. v. Freeth*, supra, 564.

If a factor pledge goods consigned to him for sale as a security for a debt, and afterwards sell them to the creditor at the market price, but no money passes, the sale is void. *Kuckein v. Wilson*, 4 B. & A. 443. So if a factor barter the goods. *Guerreiro v. Peile*, 3 B. & A. 616. See also *Guichard v. Morgan*, 4 Moore, 36. (Drawing bills on a factor against a consignment does not authorize him to raise money by pledging them. *Fielding v. Kymer*, 2 B. & B. 639.) But see the late stat. 4 Geo. IV. c. 83. When A. having sold barley to a trader, and suspecting his solvency, re-purchased it by the agency of a third person, it was held to be no fraud upon the bankrupt laws. *Harris v. Lunen*, 1 B. & B. 390.

(r) Ibid.

goods, and reclaim them on account of fraud in the vendee, it must appear that deceptive assertions and false representations were fraudulently made in order to induce him to part with them. The mere insolvency of the vendee, and the liability of the goods to immediate attachment by his creditors, though well known to him, and not revealed to the vendor, is not sufficient to avoid the sale. *Cross & al. v. Peters*, 1 Greenleaf, 376. See also *Buffington & al. v. Gerrish & al.* 15 Mass. Rep. 156. *Share & al. v. Anderson & al.* 7 Serg. & Rawle, 43. Goods may be reclaimed from a vendee who represented himself to be of age, when he in fact was an infant, and afterwards availed himself of his minority to avoid payment. *Badger v. Phinney*, 15 Mass. Rep. 359. If one sells goods for cash, and the vendee takes them away without paying the money, the vendor may reclaim them even by force. *Leedom v. Phillips*, 1 Yeates, 529. Where performance of the conditions of sale, and delivery of the goods, are understood by the parties to be simultaneous, possession acquired by artifice and deceit will not change the property. *Harris v. Smith*, 3 Serg. & Rawle, 20.

The vendee is not bound to communicate to the vendor any intelligence in his possession, relative to extrinsic circumstances (such, for example, as political events) which might influence the price of the commodity. Yet each party must take care not to do or say any thing tending to impose upon the other; and whether any imposition was practised by the vendee is a question for the jury. *Laidlaw & al. v. Organ*, 2 Wheat. 178. See Mr. Verplanck's Essay on Contracts. Pothier, De Vente, Nos. 233 to 241.]

PART
IV.

Trover.
By vendee
of ship.
Assignees.

The vendee of a ship, who claims by virtue of a sale by the master, in a foreign country, must not only prove the sale, but also that it was *necessary*, and that it took place under circumstances which would have induced the owner himself to have sold the vessel (s).

Where the assignees of a bankrupt sue in trover for goods which have been sold by the bankrupt, it is incumbent on them, where a stoppage in *transitu* is relied upon, to prove that the *transitus* was determined. Whether the *transitus* be determined or not, seems to be a question of law arising upon the special circumstances of the case. The object of proof in such cases, is an actual or constructive delivery (t) of * the goods to the vendee, or his repre-

* 1645

(s) *Hayman v. Molton*, 5 Esp. C. 65. And see Abbott's L. S. 5. See also *Cannon v. Meaburn*, 1 Bing. 243, and the case of *The Gratitude*, 3 Rob. 240; *Reid v. Darby*, 10 East, 143; *Read v. Benham*, 3 B. & B. 147. [Phillips on Insurance, 407-412.] So as to the sale of a cargo. *Freeman v. East India Company*, 5 B. & A. 617.

(t) As by the delivery of the key of the warehouse in which they are deposited (*Ellis v. Hunt*, 3 T. R. 464; *Copland v. Stein*, 8 T. R. 199); by payment of rent for the warehouse (*Hurry v. Mangles*, 1 Camp. 452; *Harman v. Anderson*, 2 Camp. 243); the lodgment of a delivery-note with the wharfinger. (Ibid.) By a part delivery, where there is no intention to separate part from the rest (*Sluby v. Heyward*, 2 H. B. 504; *Hammond v. Anderson*, 1 N. R. 69; *Ex parte Gwynne*, 12 Ves. jun. 379; *Stoveld v. Hughes*, 14 East, 306); by delivery at the warehouse of the vendee's agent, where no ulterior or more complete delivery is contemplated (*Leeds v. Wright*, 3 B. & P. 320. And see 3 B. & P. 127; *Scott v. Pettit*, 3 B. & P. 469). As where they are sent to an agent, who under general orders from the vendor sends them to a packer (Ibid.); or by an act of ownership exercised by the vendee whilst the goods are in the hands of his agent, although they have not reached the place of ultimate destination (*Wright v. Lawes*, 4 Esp. C. 82); by delivery on board a ship chartered and fitted out by the vendee (*Fowler v. M'Taggart*, cited 7 T. R. 442; 1 East, 552; 3 East, 396); by reaching an expeditor who holds them till he receives orders for their further destination. *Dixon v. Balduen*, 5 East, 175.

But such a delivery as would be sufficient in the absence of insolvency to vest the property in the vendee, is frequently insufficient to divest the right of stoppage in *transitu*. It seems to be a general rule, that so long as the goods are in the possession of one who is a mere agent, to forward them in order to give a more complete possession to the vendee, the *transitus* continues: as where they are delivered to a wharfinger to be forwarded to the vendee (*Hodgson v. Loy*, 7 T. R. 440; *Mills v. Ball*, 2 B. & P. 457; *Smith v. Goss*, 1 Camp. 282); although the wharfinger be employed by the vendee (*Smith v. Goss*, 1 Camp. 282; *Oppenheim v. Russell*, 3 B. & P. 42; and see *Snee v. Prescott*, 1 Atk. 245; *Lickbarrow v. Mason*, 1 H. B. 364; *Hunt v. Ward*, cited 3 T. R. 467; *Frise v. Wray*, 3 East. 93); or to a packer by order of the vendee (*Hunt v.*

sentative. The general nature of the evidence has already been adverted to (u).

PART
IV.

* A defendant in trover for goods deposited with him by the plaintiff, as his warehouseman, having received notice from *A. B.*, who claims property in the goods, to hold them on his account, is not estopped from setting up the claim of *A. B.* by way of defence to the action (x).

* 1646
Trover.
Assignees.

But where a warehouseman, at the request of the vendor, gave a written acknowledgment to the vendee that he held the goods for the latter, it was held that he could not refuse to deliver them on the ground that by custom the property does not vest in the vendee till re-measurement (y).

The vendee may also recover the deposit or price, as money had and received to his use, in all cases where the contract is rescinded, either by the very terms of the original contract, or by consent, or by the act of the defendant; for then the consideration wholly fails (z) (1).

Money had
and received.

Ward, 3 T. R. 467); provided the vendee does not use the wharfinger's or packer's warehouse as his own, and that he contemplates an ulterior place of delivery (*Wright v. Lawes*, 4 Esp. C. 82; per *Chambre, J. Richardson v. Goss*, 3 B. & P. 127). So a delivery of plate to an engraver employed by the vendor (*Owenston v. Morse*, 7 T. R. 64); of goods to a common carrier (*Stokes v. La Riviere*, cited, 3 T. R. 466; *Hunter v. Beal*, *Ibid.*), so long as the lien of the carrier remains (*Crawshaw v. Eades*, 1 B. & C. 181); or on board a general ship (*Ibid.* and 3 East, 397; 7 T. R. 440; *Mills v. Ball*, 2 B. & P. 457); though at the risk and expense, and in the name and by the appointment of the vendee, will not divest the right of stoppage in transitu. And see *Ruck v. Hatfield*, 5 B. & A. 632.

The right of stoppage in transitu cannot be exercised to the disturbance of the right of third persons. If the first vendor do any act by which he sanctions the sale by his vendee, his right of stoppage in transitu is divested. See the opinions of the Judges in *Hawes v. Watson*, 2 B. & C. 540. *Supra*, 1643; *Stoveld v. Hughes*, 14 East, 306; *Harman v. Anderson*, 2 Camp. 243.

(u) *Supra*, 168.

(z) *Ogle v. Atkinson*, 1 Marsh. 323; 5 Taunt. 759. *Noble v. Adams*, 7 Taunt. 59. 2 Marsh. 366.

(y) *Stonard v. Dunkin*, 2 Camp. 344.

(z) *Supra*, 116; *infra*. *Warranty*. *Secus*, where the parties cannot be placed in *statu quo*. *Hunt v. Silk*, 5 East, 449.

(1) [In South Carolina, an action for money had and received will not lie to recover back the purchase money, where the property proves to be unsound, *unless* there has been a return, or at least a tender of it, or where there has been an entire failure of the consideration. *Wharton v. O'Hara*, 2 Nott & M'Cord, 65. *Duncan v. Bell*, *ibid.* 153. *Ashley v. Reeves*, 2 M'Cord, 432. But, where the action is brought on a note given for the purchase money, and the

PART
IV.

Where the price of goods has been paid, the vendee cannot recover the price as upon a failure of consideration, although the goods were in a bad condition, or even unfit for use (a) (2).

Competency.

A witness who is answerable to a vendee, in case the title turn out to be defective, is not competent to support the title in an action against his vendee, * founded on an alleged defect of title (b). But one who has sold an inhe-

* 1647

(a) *Fortune v. Lingham*, 2 Camp. 416.

(b) 2 Roll. Ab. 685; 1 Str. 445. In the case of *Briggs v. Crick*, 5 Esp. C. 99, Cor. Lord Alvanley, it is stated to have been ruled that the original vendor of a horse, with a warranty of soundness, was a competent witness to prove the soundness in an action against his vendee on a similar warranty, on the ground that there was no direct interest, and that although the horse might have been sound when sold by the witness, yet unsound when sold by the defendant. But the principle of this decision appears to be dubious; for, unless the testimony as to the soundness at the time of the former sale tended to prove soundness at the time of the latter sale, it would be irrelevant. If, on the other hand, his testimony of the soundness at the time of the first sale tends to proof of soundness at the time of the second, then the witness seeks to establish a fact, in which, if he failed, damages would be recovered, to which he would it seems be liable on negating the fact which he attempted to prove, viz. the soundness at the time of the first sale. See *Lewis v. Peake*, 7 Taunt. 153; 2 Marsh. 431. *Infra*, 1667.

defendant gives in evidence that the property for which it was given was defective, it is not necessary that he should prove an offer to return the property, &c. *Duncan v. Bell*, ubi sup. Where the vendor of a horse, on the vendee's offering to return it as unsound, admitted the unsoundness, and agreed to pay if the horse died, it was held that the vendee might recover back the price in an action for money had and received. *Martin v. Howell*, 2 Const. Rep. 750.

In cases of *fraud*, where the consideration fails, the vendee is not bound to demand the property he gave, nor to tender that which he received. *Boyd v. Logan*, Cooke's Rep. 394.]

(2) [In New Hampshire, it has been decided that it is no defence to an action on a note, that the article for which it was given proved to be of no value. *Reed v. Prentiss*, 1 N. Hamp. Rep. 174. But if the property had never passed, or fraud had been practised, the action on such note might be defeated. *Ibid*.

In an action for the price of a horse, the vendee may in N. York give in evidence that the horse was unsound and of no value, as a defence to the whole demand. *Becker v. Vrooman*, 13 Johns. 302.

In Tennessee, the vendee, when sued for the price of a negro warranted sound, may give in evidence in mitigation of damages, that the negro was unsound. *Sample v. Looney*, 1 Overton's Rep. 85.

In Kentucky, it is not an available defence, in assumpsit for goods sold, that the article purchased is of less value than was represented, if it was received, was of any value, and was used by the defendant. *Allison v. Noble*, 1 Littell's Rep. 279. See *Heigleman v. Jeffries*, 1 Serg. & Rawle, 477. *Supra*, Vol. II. 643, note (1).]

ritance without any covenant for good title or warranty, is competent to prove the title of his vendee (c).

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IV.

Competency.

The owner of property is competent either to affirm or disaffirm a sale by himself, in an action between other parties, for the verdict would not be evidence either for him or against him in any future action. Thus, in an action of trover, for a horse, a witness is competent to prove that the plaintiff agreed that the witness should take the horse as a security for 15*l.*, deposited by the witness with the plaintiff, and that the horse should be sold at the next Woodbridge fair, if the money was not paid in the mean time, and that the witness sold him to the defendant at that fair, the money not having been paid (d).

So in an action between the assignees of *Greaves* a bankrupt, and a purchaser from a judgment-creditor, who had taken the goods in execution, it was held that a witness was competent to prove, on the * part of the defendant, that he being the owner of the goods had contracted with the bankrupt for the sale, and had given him a delivery-order merely to enable him to take home the oil and inspect it in bulk; and that it was expressly stipulated that the bankrupt should not sell the oil until the witness had been paid by a good bill (e).

* 1648

It has been held, that in an action for goods sold to the defendant, and delivered to *A. B.* at his request, *A. B.* is not a competent witness for the plaintiff without a release (f).

And one who has purchased goods in his own name, is not, it has been held, a competent witness for the plaintiff to prove that he acted merely as agent to the defendant (g).

(c) *Busby v. Greenslate*, 1 Str. 445. [*Twambly v. Henley*, 4 Mass. Rep. 441.]

(d) *Nix v. Cutting*, 4 Taunt. 18.

(e) *Ward v. Wilkinson*, 4 B. & A. 410.

(f) *Wright v. Wardle*, 2 Camp. 200, Cor. Lord Ellenborough. The competency of *A. B.* was contended for on the ground that the plaintiff, after bringing that action, could not resort to *A. B.*; and Lord Ellenborough was at first inclined to admit the testimony; but afterwards, it is stated, deemed a release to be necessary, on the ground that the witness might have misled the plaintiff, and might still be liable in case of detection. But *qu.* whether the first impression of that very learned Judge was not the correct one, and whether, upon general principles, fraud is to be presumed in order to raise an exception to the competency of a witness. See *R. v. Newland*, East's P. C. 1001; *supra*, 585, (z).

(g) *M^r Brain v. Fortune*, 3 Camp. 317. Lord Ellenborough said, "I do not think he can be examined, either on the ground that he is a necessary witness, or that he stands indifferent between the

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IV.

Competency.

* A witness proved to be a co-partner with the defendant is not competent to defeat the action by evidence that the goods were sold to himself, and that the defendant was merely his servant; for the effect is to discharge himself of a moiety of the costs (k); but he may be rendered competent by a release (i).

- * 1650 * But a co-partner with the defendant is a competent witness for the plaintiff in such an action (k); and so is the executor of a deceased partner (l).

parties. If he was the agent of the defendants, there is no reason why this circumstance should not be proved by other evidence.* Thus he has a clear interest without any counterbalance in the event of this action. If it succeeds, the verdict would be evidence for him in an action against himself, to which he is *prima facie* liable. The remedy which it is supposed he would have against the defendants if he were to be sued on this contract, cannot be thought to render it a matter of indifference to him whether the plaintiff shall succeed in this action, or be driven to sue him as the real purchaser of the goods; he is not in the situation of a broker, for a broker buys and sells in the name of his principal, and has no personal liability to be discharged by the effect of his evidence."

But in the case of *Evans v. Williams* (7 T. R. 481, n.), Lord Kenyon held that the captain of a ship was competent to prove that the money which the plaintiff sought to recover was borrowed for the use of the defendant's ship, and not for his own use; and that as the owners would have a remedy over against him, he stood indifferent. And see *Rocher v. Busher*, 1 Starkie's C. 27.

Where, in an action for fitting up a house, the owner was called by the plaintiff to prove an agreement between the owner and the defendant, that the latter had agreed to execute the work for a certain sum, Lord Kenyon held that he was incompetent (*New v. Chidgey*, Peake's C. 98). Yet if no such agreement in fact existed, the witness would be liable to the defendant for at least the value of the work. It is true, that it might be more difficult for the defendant than for the plaintiff to recover from him. See *Buckland v. Tankard* (5 T. R. 578; *supra*, 301). But the principle of that decision appears to be dubious. See Lord Ellenborough's observations in *Birt v. Kershaw* (2 East, 461), where he says, "I know of no other case than *Buckland v. Tankard* which goes on the ground of more or less difficulty in the witness in establishing his interest against one or the other of the parties." [See Vol. II. 301, *note* (2).]

(h) *Goodacre v. Breame*, Peake's C. 174; *Cheyne v. Koops*, 4 Esp. C. 112; *Young v. Bairner*, 1 Esp. C. 103. To raise the objection, the partnership must either be admitted or proved. *Supra*, 783. *Birt v. Hood*, 1 Esp. C. 20.

(i) *Young v. Bairner*, 1 Esp. C. 103.

(k) *Supra*, 783. *Robinson v. Hudson*, 4 M. & S. 475.

(l) *Burton v. Burchall*, K. B. Hil. 43 Geo. III. Peake's L. E. 167, 5th edit.

* Yet it seems that an agent is competent to prove his own authority. *Supra*, 62; *Ilderton v. Atkinson*, 7 T. R. 480; Paley's Principal and Agent, 162.

And where it is objected that *M.* being a partner with the plaintiff ought to have been joined, *M.* is a competent witness for the plaintiff to negative the partnership (*m*).

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IV.

So a witness for the defendant is competent to prove that the credit was given to him alone (*n*). Competency.

VENUE (*o*).

THE omission to prove a local cause of action within the county is fatal, under the general issue (*p*). But where there are several facts material to the plaintiff's case, arising in different counties, the plaintiff may lay his venue in either (*q*). Local action.

Where the defendant by cutting a trench in the county of *N.* causes the plaintiff's lands to be overflowed in the county of *W.*, the venue may be laid in the latter county, although the statute, under the * authority of which the defendant acted, directs all such actions to be brought and tried in the county where the cause of such action arises (*r*). * 1651, In civil actions.

Where goods are ordered from a vendor in London, by a vendee who resides in the country, the cause of action arises in London, by the delivery to the carrier there (*s*).

Where the plaintiff has undertaken to give material evidence in the county where the venue is laid, it is not Material evidence.

(*m*) *Parsons v. Crosby*, 5 Esp. C. 199.

(*n*) *Birt v. Hood*, 1 Esp. C. 20; *supra*, 783.

(*o*) *Vide supra*, *Case, Action on*, 357; *Justices*, 820; *Libel*, 852; *Nuisance*, 988; *Penal Action*, 1125; *Perjury*, 1140; *Trespass*, 1435; *Use and Occupation*, 1511; *Usury*, 1523; *Variance*, 1570.

(*p*) *Doulson v. Matthews*, 4 T. R. 503. [Yelv. 12. a. note.] But where the defect appears on the record, it is cured after a verdict by the stat. 16 & 17 Car. II. c. 8. *Mayor of London v. Cole & others*, 7 T. R. 583. [See *Robinson v. Mead*, 7 Mass. Rep. 353, where judgment was arrested in an action of replevin. *Qu.*]

(*q*) *Mayor of London, &c. v. Cole*, 7 T. R. 583; *Bulwer's case*, 7 Co. 57; *Pope v. Davis*, 2 Taunt. 252; 2 Camp. 266; *Scott v. Brest*, 2 T. R. 238; *supra*, 1126. [See Yelv. 12. note (2).]

(*r*) *Sutton v. Clarke*, 6 Taunt. 29. 1 Marsh. 429.

(*s*) *Copeland v. Lewis*, 2 Starkie's C. 33. And therefore, though the goods in such a case ordered in Middlesex, by a defendant living in the Principality of Wales, did not amount to 10*l.*, Lord Ellenborough, upon a trial at Westminster, refused to nonsuit the plaintiff, under the Welsh Judicature Act, 13 G. III. c. 51, s. 2. And where goods under 40*s.* value had been ordered by a vendee in Leicestershire, and delivered to the carrier in London, it was held that an action could not be sustained in the county-court of Leicestershire. *Harwood v. Lester*. 3 B. & P. 617.

PART
IV.

Civil action.
Material
evidence.

sufficient to prove that the witnesses to the contract reside in that county (*t*). Nor is it sufficient to give evidence there of collateral matters which are not stated in the declaration (*u*), as, where the defendant pleaded a tender, and the plaintiff replied and proved a subsequent demand within the county where the trial was had (*x*).

But it is sufficient to give any evidence in the county which is material to the cause of action; it is not necessary to show that the *whole* cause of action arose there (*y*).

* 1652 Where the venue is retained in Middlesex by a plaintiff suing as the assignee of a bankrupt, it is sufficient to produce the commission there, tested at * Westminster (*z*); or for a party who sues on a patent, to prove the enrolment there (*a*); or to produce a rule of Court, obtained by the defendant, for the payment of money into Court, though subsequently to the plaintiff's undertaking (*b*).

Where the plaintiff on retaining the venue in *A*. undertakes to give material evidence in *A*. or *C*., proof of the delivery of the goods to a carrier in *C*., to be delivered to the defendant in *B*., is sufficient (*c*).

An undertaking to give material evidence in London, is (it has been held,) satisfied by proving an acknowledgment of the debt in a foreign country (*d*).

If the plaintiff retain the venue on the usual undertaking, but the plea and issue joined render the evidence irrelevant, he is discharged from the undertaking (*e*). As, where in an action by the assignee of a bankrupt the defendant gives no notice of disputing the bankruptcy, so that the trading or petitioning creditor's debt (of which he would otherwise have given material evidence in the county), are proved by the depositions (*f*).

(*t*) 2 Bl. R. 1031.

(*u*) *Cockerell v. Chamberlayne*, 1 Taunt. 518.

(*x*) *Ibid*.

(*y*) *Neale v. Neville, and Savory v. Spooner*, 6 Taunt. 565. 2 Marsh. 278.

(*z*) *Kensington v. Chantler*, 2 M. & S. 36. See *Clarke v. Reed*, 1 N. R. 310. Proof of issuing the writ in Middlesex is material evidence against the sheriff in an action for an escape. 2 Chitty's R. 418.

(*a*) *Cameron v. Gray*, 6 T. R. 363.

(*b*) *Watkins v. Towers*, 2 T. R. 275. And see 6 Taunt. 566.

(*c*) *Powell v. Rich*, 2 Marsh. 494. 7 Taunt. 178.

(*d*) *Gerard v. De Robeck*, 1 H. B. 280. And see *McClure v. McKeand*, 2 Taunt. 197; *sed qu*.

(*e*) 3 Taunt. 86.

(*f*) *Soulsby v. Lea*, 3 Taunt. 86. Note, that there is a distinction

The locality of offences, and the consequent necessity of proof in the proper county, have already been adverted to under the appropriate heads (*g*).

PART
IV.

* Where two facts, essential to the commission of a misdemeanor, are done, one in each of two counties, the venue, *ex necessitate*, may be laid in either (*h*). * 1653
In criminal cases.

Although evidence be insufficient which leaves it wholly indifferent, and uncertain whether the offence was or was not committed within the proper county (*i*), yet presumptive evidence that the offence was committed in the particular county is sufficient. Thus, upon an indictment against Sir Manasseh Lopez, for bribery in the county of *D.*, the bribery was proved; and in order to show that it was committed in that county, rather than in any other, evidence was adduced that the defendant, when at his seat in the county of *D.*, said "*A. B.*" (the party proved to have been bribed) "has been with me;" and the learned Judge (*k*) left it to the Jury to consider whether his being there at the time, and that being the county in which the vote was to be given, was not sufficient evidence to warrant the presumption by them that the offence was committed in that county (*l*).

It seems that the crime of conspiracy, in analogy to the case of treason, may be tried in any county in which a distinct overt act of treason has been committed (*m*).

Where several conspired on the high seas to fabricate false vouchers to defraud the Crown, and one of * the conspirators transmitted by the post, to the Commissioners of the Navy in Middlesex, false vouchers in pursuance of that conspiracy, and the innocent holder of one of the * 1654

between the cause of action and the right of action. See the observations of Heath, J. in *Clarke v. Reed*, 1 N. R. 310. It is sufficient to satisfy the plaintiff's undertaking, if he give material evidence of the right of action within the county.

(*g*) *Supra*, *Forgery*, 569. *Libel*, 852; *Penal Action*, 1125; *Perjury*, 1140; *Treason*, 1430; *Usury*, 1523. See also Starkie's *Crim. Plead.* cap. I. Where a felony is committed within 500 yards of the boundary between two counties, the offence may be laid, and the offender tried, in either, by the stat. 59 Geo. III. c. 96, s. 2.

(*h*) *Scott v. Brest*, 2 T. R. 238. *Scurry v. Freeman*, 2 B. & P. 381. *R. v. Burdett*, 4 B. & A. 95.

(*i*) *Supra*, 570.

(*k*) Mr. J. Holroyd.

(*l*) *R. v. Sir Manasseh Lopez*, cited by Holroyd, J. 4 B. & A. 141. The Court of K. B. were of opinion that this was *prima facie* evidence, and the defendant afterwards received judgment.

(*m*) 4 East, 171.

PART
IV.In criminal
cases.

false vouchers (a bill of exchange) presented it to the Commissioners in Middlesex, it was held that the defendants were properly tried in Middlesex (n).

In the case of *The King v. Bowes & others* (o), where no proof of actual conspiracy was attempted in Middlesex, but all the defendants were proved to have co-operated in forwarding the criminal purpose in different places and counties, the principle of locality was held to be satisfied by evidence of overt acts committed by some of the conspirators in Middlesex, in furtherance of the common design.

On an indictment for sending a threatening letter, which has been sent by the post, the prisoner may be indicted in the county where the letter was received by the prosecutor (p).

* 1655

* WAGER.

When illegal.

In general, it seems that a wager is legal, and may be enforced in a court of law (q), if it be not an incitement to a breach of the peace (r), or immorality; or affect the feelings or interest of a third person, or expose him to ridicule, or libel him (s); or if it be not against sound policy (t), or the provisions of a statute (u).^{*} Thus, a wager

* 1656

(n) *R. v. Brisac & Scott*, 4 East, 164.

(o) Cited by Grose, J. 4 East, 171.

(p) East's P. C. 1120. Where a prisoner was indicted in Middlesex for uttering forged stamps, and the proof was that he lived in Middlesex, and sent the forged stamps by his servant in a parcel to London, that they might be forwarded to Bath, seven of the Judges were of opinion that he was guilty of uttering in Middlesex, but the other five were of a contrary opinion. *R. v. Collicott*, cited by Bayley, J. 4 B. & A. 154. As to the sending a sealed libel by the post, see *R. v. Burdett*, 4 B. & A. 95; *supra*, tit. *Libel*. And see tit. *Forgery*.

(q) *Good v. Elliott*, 3 T. R. 693.

(r) *Semble*, that a wager between the proprietors of two carriages for the conveyance of passengers for hire, that a given person should go by one of those carriages, and no other, is illegal. *Eltham v. Kingsman*, 1 B. & A. 683.

(s) As where a wager is laid on the sex of a third person. *Dacosta v. Jones*, Cowp. 729. 736; *Roebuck v. Hammerton*, Ibid. 737.

(t) [*Mount & al. v. Waite*, 7 Johns. 434.] Such as a wager as to the probable amount of the public revenue (*Atherfold v. Beard*, 2 T. R. 610); or hop-duties (*Shirley v. Sankey*, 2 B. & P. 130); or a
wager

(u) A wager on a horse-race for less than 50*l.* is illegal, the stat. 13 Geo. II. c. 19, s. 2, having prohibited such races; so is a wager
for

that *A.* has purchased a waggon of *B.*, is not void, either at common law or under the stat. 14 Geo. II. c. 48. (x).

PART
IV.

wager on the event of a cause in the House of Lords, or the courts of justice, if laid with a lord of parliament, or judge (per Lord Mansfield, 1 T. R. 60.) So a wager on the life of the first consul of the French republic was held to be illegal, on the ground of immorality and impolicy (*Gilbert v. Sykes*, 16 East, 150). Note, the bet arose out of a conversation upon the probability of his coming to a violent death by assassination, &c. So is a wager which may operate in restraint of marriage (*Hartley v. Rice*, 10 East, 22); or between two voters with respect to the event of an election of a member to serve in parliament, laid before the poll is begun (*Allen v. Hearn*, 1 T. R. 56.) [*Bunn v. Riker*, 4 Johns. 426. *Wroth v. Johnson*, 4 Har. & M'Hen. 284. Or after the poll is closed. *Lansing v. Lansing*, 8 Johns. 454. *Smyth v. M'Masters*, 2 Browne's Rep. 182.]; or upon the contingency of peace between this country and another with which it is at war (*Lacausade v. White*, 7 T. R. 535; *Foster v. Thackery*, cited 1 T. R. 57; *Aubert v. Walsh*, 3 Taunt. 277). In *Andrews v. Herne* (1 Lev. 33), it was held that a wager whether Charles Stuart would be king of England within twelve months next following was good; but the ground of impolicy was not objected. See Lord Ellenborough's observations on this case, in *Gilbert v. Sykes*, 16 East, 150. See also the *Earl of March v. Pigot* (5 Burr. 2802), where a wager on the lives of the respective fathers of the parties was held to be valid, although the father of one was dead at the time, of which the parties were ignorant. But see the observations of Heath, J. on this case, 3 Camp. 172; and *Bland v. Collett*, 4 Camp. 157. [& Mr. Howe's note.]

for more than 50*l.* to run against time (*Ximenes v. Jaques*, 6 T. R. 499); so is a wager for 500 guineas, &c. that a single horse shall go from *A.* to *B.* on the high road sooner than one of two others, to be placed at any distance their owner should please; these transactions being prohibited by the stat. 16 Car. I. c. 7, s. 2. and 9 Ann. c. 14, and not legalized by 13 Geo. II. c. 19, or 18 Geo. II. c. 34, which relate to *bona fide* horse-racing only. *Whaley v. Pajot*, 2 B. & P. 51.

But where the race is a legal one for 50*l.*, a wager for less than 10*l.* is legal, not being contrary to the stat. 9 Ann. c. 14 (*M'Allester v. Haden*, 2 Camp. 438; per Lord Kenyon, in *Good v. Elliott*, 3 T. R. 706). And see *Bulling v. Frost* (1 Esp. C. 235), where Lord Kenyon held that an action lay to recover the sum of 3*l.* 10*s.* lost at all-fours. *Secus*, where the race is run for less than 50*l.* (*Johnson v. Bann*, 4 T. R. 1.) See *Simpson v. Bloss*, 7 Taunt. 246; 2 Marsh. 542; *infra*, 1658. A race for 25*l.* a side is a legal race for 50*l.* *Bidmead v. Gale*, 4 Burr. 2432; 1 Bl. Rep. 671.

By

(x) *Ibid.* See also *Micklefield v. Hepgin*, 1 Anst. 133; *Pope v. St. Leger*, 1 Salk. 344; *Bulling v. Frost*, 1 Esp. C. 235; *M'Allester v. Haden*, 2 Camp. 438; *Hussey v. Crickett*, 3 Camp. 168; *Jones v. Randall*, Cowp. 37. [*Bunn v. Riker*, 4 Johns. 426. *Campbell v. Richardson*, 10 Johns. 406. *Morgan v. Richards*, 1 Browne's Rep. 171.]

PART
IV.

When illegal.

Illegal wager.

* The Court will not try an action upon a wager on an abstract speculative question of law, or judicial practice, not arising out of circumstances in which the parties have a real interest (*z*); and Lord Ellenborough refused to try a wager on a cock-fight, because the discussion of such a question tended to the degradation of courts of justice (*a*).

No demand can be enforced which cannot be established but through the medium of an illegal bargain. The plaintiff laid an illegal wager with *B.*, the defendant took part in the bet; the plaintiff won; and at the defendant's request, before the day appointed for payment, advanced to him his share of the winnings; *B.* died insolvent before that day, and the wager was never paid, and it was held, that as the plaintiff could not establish his case but through

* 1658 * the medium of the illegal wager, he was not entitled to recover (*b*).

By 16 Car. II. the winner of any money or valuable by deceit in playing at cards, dice, tennis, bowls, skittles, shovel-board, or in cock-fighting, horse-races, dog-matches, foot-races, or other games, or by bearing a part in the stakes, or by betting, &c. shall forfeit treble value. The third section avoids all securities for payment of sums exceeding 100*l.* lost at one time, &c. and this clause extends to a contract which precedes the playing (*Hedgeborrow v. Rosenden*, 1 Vent. 253); and to an acceptance by a third person to secure the money lost. *Hussey v. Jacob*, 1 Salk. 344; Carth. 356; 5 Mod. 176.

By 9 Ann. c. 14, s. 2, the loser by playing or betting to the amount or value of 10*l.* may recover treble the value against the receiver, by action to be commenced within three months; and if the loser do not sue within the time, any person may afterwards sue. This section does not avoid the contract; and therefore it was held, that one who had lost a mare of the value of 25*l.* by tossing up, but did not bring trover till the three months were expired, could not afterwards recover. *Vaughan v. Whitcomb*, 2 N. R. 418.

(*z*) *Henkin v. Gueras*, 12 East, 247. [and Mr. Day's notes.]

(*a*) *Squires v. Whisken*, 3 Camp. 140. Lord Loughborough refused to try an action on a wager as to the mode of playing hazard (*Brown v. Leeson*, 2 H. B. 43); and Gibbs, C. J. pursued the same course where the wager was whether a married woman had had a child. *Ditchburn v. Goldsmith*, 4 Camp. 152. But it seems that a Judge is bound to try an action brought to recover a stake deposited in the hands of a stakeholder after his authority has been countermanded. *Bate v. Cartwright*, 7 Price, 540.

So no action will lie on a wager respecting the mode of playing an illegal game, and if such a cause be set down for trial, the Judge is justified in ordering it to be struck out of the paper (*Brown v. Leeson*, 2 H. B. 43). Buller, J. was inclined to think that the stat. 14 Geo. III. c. 48, made all wagers void wherein the parties had no interest. *Atherford v. Beard*, 2 T. R. 616.

(*b*) [*Haskett v. Wootan*, 1 Nott & M'Cord, 180.] *Simpson v. Bloss*, 7 Taunt. 246. 2 Marsh. 542. The wager was 25 guineas on a legal case for 50*l.*

An action will not lie on a promissory note to enforce the payment of an illegal wager (c).

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And by virtue of the stat. 9 Anne, c. 14, s. 1. (d), no one who derives title through the winner can make the loser pay; but the fact, that a bill was accepted for securing money won at play is no defence in an action by a *bona fide* holder against the drawer (e).

Illegal wager.

In the case even of a legal wager, the authority of a stakeholder, like that of an arbitrator, may be rescinded by either party before the event has happened. And if after his authority has been countermanded, and the stake has been demanded, he refuse to deliver it, *trover* or *assumpsit* for money had and received is maintainable (f). And where the wager is in its nature illegal, the stake may be recovered, even after the event, on demand made before it has * been paid over (g) (1); as if the wager be on a foot- * 1659 race (h), or boxing match (i).

(c) *Shirley v. Sankey*, 2 B. & P. 130. [*Denniston v. Cook*, 12 Johns. 376.] But a *bona fide* holder without notice might recover.

(d) By this stat. all notes, bills, bonds, judgments, mortgages, or other securities, given by any person, when the whole or any part of the consideration of such securities shall be for money or other valuable thing won by gaming, or playing at cards, dice, tables, tennis, bowls, or other games,* or by betting on the side of such as game at any of the aforesaid games, or for repaying any money knowingly lent for such gaming or betting, or lent at the time and place of such play, to any person that shall play or bet, shall be void. [See *Haywood v. Sheldon* 13 Johns 88. *Collins v. Ragrew*, 15 ib. 5. *Zielly v. Warren*, 17 ib. 192.]

(e) *Edwards v. Dick*, 4 B. & A. 212. Vide *Bowyer v. Bampton*, 2 Str. 1105; *supra*, 284.

(f) *Eltham v. Kingsmill*, 1 B & A. 683.

(g) *Smith v. Bickmore*, 4 Taunt. 474; *Bale v. Cartwright*, 7 Price, 540.

(h) 4 Taunt. 474.

(i) *Cotton v. Thurland*, 5 T. R. 405.

* The statute, it seems, applies to all games of chance as well as skill (*Stigel v. Jebb*, 3 Starkie's C. 1); to horse-races (*Goodburn v. Marley*, 2 Str. 1159; *Blaxton v. Pye*, 2 Wils. 309; *Clayton v. Jennings*, 2 Bl. Rep. 706); to foot-races (*Lynall v. Longbotham*, 2 Wils. 36; *Brown v. Berkeley*, Cowp. 281). *Semble*, to a game at cricket. *Jeffreys v. Walter*, 1 Wils. 220.

(1) [See *Fischer v. Yates*, 11 Johns. 23. *Yates v. Foot*, 12 Johns. 1. *Simmons v. Borland*, 10 Johns. 468. *McCullum v. Gourlay*, 8 Johns. 147. *Livingston v. Wootan*, 1 Nott & McCord, 178.]

PART
IV.

WAR.

THE proper evidence to prove the relation of peace or war is the official declaration of the State on the subject. A proclamation of peace published in the Gazette is evidence of the fact (*k*). And a proclamation for reprisals so published is evidence of war (*l*). So a recital of the existence of war in an act of parliament is evidence to prove it (*m*).

A recognition in an Order of Council, that particular ports and places are not in the possession, or under the dominion, of the enemy, is evidence of the fact, although the order was made for a collateral purpose (*n*).

Public notoriety is also sufficient to prove the country to be in a state of war (*o*).

A declaration of war by a foreign government, transmitted by the British ambassador to the Secretary of State's office, is evidence to prove the time of the commencement of hostilities between that foreign state and another (*p*). But the notoriety of the existence of war between two foreign states will not be evidence to prove that fact (*q*).

* 1660

* WARRANTY.

Proof of the
contract.

THE general rule of law is *caveat emptor*, and the buyer, whatever may be the defects of the article purchased, cannot recover but upon a warranty (*r*), or upon the ground that fraud and deceit have been practised (*s*) (1). The

(*k*) 5 T. R. 436; *Dupays v. Shepherd*, Holt, 296; *Quelch's case*, 8 St. Tr. 212.

(*l*) *R. v. Sutton*, 4 M. & S. 532; *Van Omeron v. Dowick*, 2 Camp. 44.

(*m*) *R. v. Sutton*, 4 M. & S. 532.

(*n*) *Blackburne v. Thomson*, 3 Camp. 67, S. C. 15 East, 90.

(*o*) Fost. Disc. c. 2, s. 12, p. 219. And see the cases of *Friend*, *Parkyn*, *Cook*, and *Vaughan*, in the State Trials.

(*p*) *Theellusson v. Cosling*, 4 Esp. C. 266.

(*q*) *Dolder v. Lord Huntingfield*, 11 Ves. jun. 292.

(*r*) See the case of *Parkinson v. Lee*, 2 East, 314; *infra*, 1663.

(*s*) *Vide supra*, tit. *Deceit*. As where the goods are not the vendor's property, or where he sells unwholesome provisions (1). And see *Hughes v. Gordon*, 1 Bligh, 287.

(1) [In South Carolina, it is held that selling for a sound price

plaintiff, in an action for breach of warranty, whether the form of action be *assumpsit* (t) or *tort*, must of course prove the warranty as alleged (u).

PART
IV.

A receipt on a receipt-stamp is evidence of a warranty on the sale of goods (x), if it contain the terms. So is the description of the goods in the invoice (y). Express.

(t) *Supra*, tit. *Assumpsit*.

(u) It is usually laid in *assumpsit* for the sake of adding the money counts. *Stuart v. Wilkins*, Dougl. 18.

(x) *Skrine v. Elmore*, 2 Camp. 407; *supra*, 1362.

(y) *Bridge v. Wain*, 1 Starkie's C. 504.

raises in law a warranty of the soundness of the thing sold—and the warranty extends to all faults known or unknown to the vendor. *The State v. Gaillard*, 2 Bay, 19. *Lester v. Graham*, 1 Rep. Con. Ct. 182. *Crawford v. Wilson*, 2 ib. 353. *Timrod v. Shoolbred*, 1 Bay, 319. *Barnard v. Yates*, 1 Nott & M'Cord, 142. *Missroon v. Waldo*, 2 ib. 76. See also *Wells v. Spears*, 1 M'Cord, 421. In *Nelson v. Dickinson*, however, it was held that a vendor of chattels is not answerable for defects which he did not know, when there is no warranty. 1 Desauss. 133. So in *Whitefield v. M'Cleod*, 2 Bay, 380, it is said, that though a sound price has been given, yet if the buyer was fully informed of all the circumstances, and there has been no fraud or circumvention, he shall be held to his bargain.

In North Carolina, the same doctrine prevailed formerly; *Galbraith v. Wythe*, 1 Hayw. 464. *Toris v. Long*, 1 Taylor, 17; but it has recently been held that without an express warranty by the seller, or fraud on his part, the buyer of a chattel must sustain all losses arising from latent defects. *Erwin v. Maxwell*, 2 Murphey, 245. See also *Lanier v. Auld*, 1 Murphey, 138, that a contract of sale implies no warranty as to the quality of goods sold, though it may imply a warranty of title, when the vendor is in possession.

This doctrine, that a sound price implies a warranty, gives a corresponding character to several decisions on other points, which are cited *Supra*, tit. *Vendor & Vendee*, in the notes.

In most of the other States, the doctrine of the text is adopted, viz. that a vendor of personal chattels is not liable for defects in the article sold, unless he makes an express warranty, or is guilty of fraud. *Penniman v. Pierson*, 1 Chip. Rep. 394. *Reed v. Prentiss*, 1 N. Hamp. Rep. 176. *Emerson & al. v. Brigham & al.* 10 Mass. Rep. 197. *Seizas v. Woods*, 2 Caines' Rep. 48. *Defreeze v. Trumper*, 1 Johns. 274. *Holden v. Dakin*, 4 Johns. 421. *Davis v. Meecker*, 5 Johns. 354. *Sweet v. Colgate & al.* 20 Johns. 196. *Fleming v. Slocum*, 18 Johns. 403. *Willing & al. v. Consequa*, 1 Peters' Rep. 317. *Kimmel v. Litchty*, 3 Yeates, 262. *Jackson v. Wetherill*, 7 Serg. & Rawle, 480. *Westmoreland v. Dixon*, 2 Hayw. (Tenn.) Rep. 227. *Dean v. Mason*, 4 Conn. Rep. 428. See Yelv. 21. a. note (1), and Mr. Howe's note to *Gardiner v. Gray*, 4 Camp. 145.

In 3 Bl. Com. 164, it is said that in contracts for provisions, there is always an implied warranty that they are wholesome. See also Keilw. 91. a. *Van Bracklin v. Fonda*, 12 Johns. 468. acc. See vide remarks of *Popham*, C. J. *Dyer*, 75, a. n. *Emerson & al. v. Brigham & al.* ubi sup. contra.]

PART
IV.

Proof of
contract.
* 1661

The printed conditions of sale pasted up under the auctioneer's box are notice of those conditions to purchasers (z).

Every affirmation at the time of sale or personal chattels (a) is a warranty, provided it appear in evidence, * to have been so intended (b) (1); so, if previous to the time

(z) Per Lord Kenyon, C. J. in *Mesnard v. Aldridge*, 3 Esp. C. 271.

(a) The law implies no warranty upon the sale of a real estate. [*Pollard v. Lyman*, 1 Day, 156.] See *Roswel v. Vaughan*, Cro. Jac. 196; *Goodtitle v. Morgan*, 1 T. R. 755; *Hitchcock v. Giddings*, 4 Price, 135. [Yelv. 21. b. note.] The ordinary remedy is by an action on the express covenants (see tit. *Covenant*). The usual covenants entered into by a vendor who is seised in fee are, 1st. That he is seised in fee; 2dly. That he has power to convey; 3dly. For quiet enjoyment; 4thly. That the estate is free from incumbrances; lastly, For further assurances. The word *dedi* in a feoffment imports a warranty of title (Co. Litt. 384, a.) but the word *concessi* does not.

(b) Per Buller, J. 3 T. R. 57; *Helyear v. Hawke*, 5 Esp. C. 72.

(1) [To prove a warranty it is not necessary to show that the defendant used the word *warrant*, or any other particular phrase; any words of an import equivalent to *warrant*, and showing an intention of the parties that there should be a warranty, are sufficient. *Chapman v. Murch*, 19 Johns. 290. *Swoett v. Colgate & al.* 20 Johns. 203, per Woodworth, J. *Bacon v. Brown*, 3 Bibb, 35. *Jackson v. Witherell*, 7 Serg. & Rawle, 482, per Duncan, J.]

The following words in a bill of sale of a negro, "being of sound wind and limb, and free from disease," were held to amount to an express warranty of soundness. *Cramer v. Bradshaw*, 10 Johns. 484. So, where a slave was sold as "about 11 years old, sound and healthy, and I do by these presents further covenant and agree to warrant the right and defend the title of the said slave;" it was held that this was a warranty of soundness. *Gilchrist v. Mann*, 2 Car. Law Repos. 667.

An advertisement of property for sale, which gives it a higher character than it deserves, does not amount to a warranty as to the quality, if the purchaser relies on his own examination. *Calhoun v. Vecchio*, Circuit Court, April, 1812. Wharton's Digest, 595.

An assertion by the vendor to the vendee, at the time of selling a mare, that he was sure she was safe, and kind, and gentle in harness, was held to be only a representation, and not to constitute a warranty or express promise that she was so. 7 Serg. & Rawle, *ubi sup.* It must appear from the whole evidence, that the affir- mant intended to warrant, and did not express a mere matter of judgment or opinion. The words must not be dubious or equivocal. *Ibid.* per Duncan, J. Where after a contract of sale of a horse had been made, and the purchase money was about to be paid, the buyer asked the seller if the horse was sound, to which the latter answered that it was; it was held that the answer did not amount to an express warranty. *Erwin v. Maxwell*, 2 Murphey, 245. If a man should say, on the sale of a horse, "I promise you

of sale the vendor says he will warrant the goods, and having named his price, gives the vendee two or three days to consider of it, and the vendee then agrees to purchase (c). But a warranty after sale is void for want of consideration (d).

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IV.

Proof of
contract.

An affirmation at the time of sale, by one in possession of property, that it is his, amounts to a warranty (e) (2). So if the vendor declare at the time of the sale of turnip-seed that he *could* warrant it to be good white round turnip-seed (f). But no oral representation previously to a sale by written contract will operate as a warranty (g); for the writing is the only legitimate evidence to prove the terms of the contract. In such and in all cases, where there is no warranty, express or implied, but where the vendor has by artifice or misrepresentation circumvented the purchaser, the remedy of the latter is by an action for the deceit (h) (3).

(c) Per Holt, C. J. in *Lysney v. Selby*, 2 Ld. Raym. 1120.

(d) 3 Bl. C. 166.

(e) Per Holt, C. J. in *Medina v. Stoughton*, 1 Salk. 210. *Secus*, according to Lord Holt, where the vendor is not in possession, for then there is room to question the seller's title. But this distinction is doubted by Buller, J. (3 T. R. 57, 8), and the distinction is not mentioned in another report of the same case. 1 Ld. Raym. 593.

(f) *Button v. Corder*, 7 Taunt. 405. 1 Moore, 109.

(g) *Pickering v. Dowson*, 4 Taunt. 779. [*Mumford v. M^r Pherson*, 1 Johns. 414. *Wilson v. Marsh*, *ibid.* 503.]

(h) *Supra*, 468.

the horse is sound," it is difficult to conceive that this is not an express warranty. Per Spencer, C. J. 19 Johns. *ubi sup.*]

(2) [*Ritchie v. Summers & al.* 3 Yeates, 534. *Lanier v. Auld*, 1 Murphey, 138. *Chism v. Woods*, Hardin, 531. *Scott v. Scott*, 2 Marsh. 218. *Payne v. Rodden*, 4 Bibb, 304. *Defreeze v. Trumper*, 1 Johns. 274. *Heermance v. Vernoy*, 6 Johns. 5. *Acc.* But a purchaser, knowing that the goods purchased are claimed by a third person, if he voluntarily pays the price of them to such third person, cannot afterwards, in a suit brought by the vendor against him for the price, set up as a defence the vendor's want of title and that he had paid the true owner. *Aliter*, if he has been compelled to pay the price to another person who claimed the property and brought his action against him, and recovered. *Vibbard & al. v. Johnson*, 19 Johns. 77. See *Hook v. Robison*, Addison's Rep. 271.]

(3) [In Pennsylvania, in an action of deceit, on an exchange of horses, the plaintiff alleging a warranty on the part of the defendant that his horse was sound, evidence is admissible on the part of the defendant, that the plaintiff's horse was also unsound. *McLene v. Fullerton*, 4 Yeates, 522.]

PART
IV.* 1662
Implied
warranty.

In some instances the law will imply a warranty.

* On proof of a general custom in a particular branch of trade, it will be presumed that the parties contracted accordingly (*k*). The custom in the pimento trade is to declare at the time of sale whether the pimento is sea-damaged; and hence in the absence of such a declaration, a warranty will be implied that the article was not sea-damaged (*l*).

In every contract to furnish manufactured goods, there is an implied contract, on the part of the manufacturer, that they shall be of a merchantable quality (*m*). And upon a written contract for goods of a particular denomination, which the purchaser has no opportunity of inspecting, the law will imply a warranty of a saleable article corresponding with the contract (*n*). But no warranty will be implied that the goods shall correspond with a sample shown to the buyer, but not mentioned in the contract (*o*).

A stipulation that the chattel shall be taken with "all faults," is to be limited to such as are consistent with the article being that which it is described to be (*p*).

Where a ship was described in the advertisement of sale to be "a copper-fastened vessel," and it turned out that she was not copper-fastened, the plaintiff, it was held, was entitled to recover, notwithstanding a clause in the advertisement that she was to be taken * with all faults and without deduction for any defects whatsoever (*q*).

The law will in no case imply any warranty, where the parties have contracted as to the nature and quality of the thing sold. Thus, upon a sale of goods by sample, the law will not imply a contract that they shall be merchantable (*r*), although a merchantable price be given (*s*) (1).

(*k*) *Jones v. Bowden*, 4 Taunt. 847.

(*l*) *Ibid*.

(*m*) *Lang v. Fidgeon*, 6 Taunt. 108; 4 Camp. 169. Where a publican agrees with a brewer to take all his beer of him, the brewer is bound to supply beer of a fair merchantable quality. *Holcombe v. Hewson*, 2 Camp. 391; *Cooper v. Turbill*, 3 Camp. 286, n.

(*n*) *Gardiner v. Gray*, 4 Camp. 144, [and Mr. Howe's note.]

(*o*) *Ibid*.

(*p*) 5 B. & A. 240.

(*q*) *Shepherd v. Kain*, 5 B. & A. 240.

(*r*) *Parkinson v. Lee*, 2 East, 314.

(*s*) *Ibid*.

(1) [A sale by sample is tantamount to a warranty that the com-

Nor will the law imply a warranty against a latent defect, from the price given, whether it be known or unknown to the seller (t).

PART
IV.

If goods be sold by sample, it will be sufficient if the bulk corresponds with the sample (u). Implied warranty.

If there be a latent defect in the thing sold, and there be no warranty, express or implied, the buyer cannot recover but by action on the case for deceit, on proof that the seller knew of the defect, and practised some artifice to conceal it (x).

A servant employed to sell a horse has an implied authority to warrant that it is sound (y); and his * declaration, made at the time, is evidence to prove such warranty (z). But a declaration made by such an agent at another Warranty by an agent.
* 1664

(t) *Baglehole v. Walters*, 3 Camp. 154; 2 East, 314. [*Supra*, 1633. 1660, note (1).]

(u) *Parkinson v. Lee*, 2 East, 314. [*Sands & al. v. Taylor & al.* 5 Johns. 395.]

(x) *Ibid.* and *supra*, 468. *Pickering v. Dowson*, 4 Taunt. 779. A. purchased of B. ten dozen of Burgundy, and a year afterwards A. applied to B. to exchange Champagne for the Burgundy, which B. accordingly did; the Burgundy at the time of the sale was of excellent quality, but at the time of the exchange was sour. On action brought by B. to recover the value of the Champagne, or a compensation for the bad condition of the Burgundy, Lord Ellenborough held, that in the absence of any evidence, either of an express warranty or of fraud, the action could not be supported. *La Neuville v. Nourse*, 3 Camp. 351.

(y) *Alexander v. Gibson*, 2 Camp. 555; *Pickering v. Busk*, 15 East, 38. 45. But see *Truswell v. Middleton*, 2 Roll. R. 269, 270; and *Strode v. Dyson*, 1 Smith's R. 400.

(z) *Helyear v. Hawke*, 5 Esp. C. 72; *Alexander v. Gibson*, 2 Camp. 555. But there is a distinction between a general and a special agent. A principal will be bound by the act of a general agent, although he act contrary to express orders. *Secus*, in the case of a special agent. See 3 T. R. 760, 761; and the distinction taken

modity in bulk is of the same kind as the sample. Thus, where the defendant sold several casks of cloves by a sample of Cayenne cloves, and the casks were found to contain a mixture of Cayenne and East India cloves, the latter of which were of an inferior species; it was held that the plaintiff was entitled to recover the difference in value between the cloves sold by sample, and those which were delivered; although there was no fraud. *Bradford v. Manly*, 13 Mass. Rep. 139. See *Parker & al. v. Palmer*, 4 B. & A. 387. *Willing & al. v. Consequa*, 1 Peters' Rep. 317. *Rose v. Beattie*, cited *Supra*, 1629, note (1). An examination of samples is not a waiver of an express warranty, if there be one. 1 Peters' Rep. ubi *sup.*]

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IV.

Variance.

time, is not admissible to prove a warranty; the agent himself must be called (a).

Proof that the parties agreed that a chattel should be given, and taken in part payment, is no variance from an allegation of sale at a specific price in money, for it is a mere mode of payment (b).

And where the receipt expresses the sale for a specific money-price, there is no variance, although it appear that the vendor took a chattel in part payment, and the rest in money, for the receipt admits that the chattel was taken as money (c).

The plaintiff is entitled to recover without proving that he has returned the article (d). But where the * warranty on the sale of a pair of coach-horses was accompanied by an undertaking on the part of the vendor to take back the horses "if on trial they should have any of the before-mentioned faults," it was held that the purchaser could not, after a reasonable time for trial had elapsed, and not having been induced to prolong the time by any subsequent misrepresentation on the part of the seller, recover on the warranty (e), although one of the horses was defective within the terms of the warranty at the time of sale (f).

* 1665
Notice.

by Lord Kenyon, in *The East India Company v. Hensley*, 1 Esp. C. 112. See also *Ambler*, 497, 8. Where the agent warrants beyond the scope of his authority, he is personally liable.

(a) *Ibid*.

(b) *Hands v. Burton*, 9 East, 349. The declaration alleged a warranty in consideration of the plaintiff's purchasing the defendant's horse for 31l. 10s., and alleged the purchase and the payment of that sum. The proof was, that the defendant agreed to dispose of his horse, which he warranted sound, to the plaintiff for thirty guineas, but agreed at the same time, that if the plaintiff would take the horse at that value, he (the defendant) would purchase of the plaintiff's brother another horse for fourteen guineas, and that the difference only should be paid to the defendant. The witness described it as *one deal* between the parties, and that but for the latter consideration he did not believe that the bargain would have been made. But the Court overruled the objection.

(c) *Brown v. Fry*, Devon Sum. Ass. 1808, Sel. N. P. 630.

(d) *Supra*, 645; *Fielder v. Starkin*, 1 H. B. 17; *Buchanan v. Parnshaw*, 2 T. R. 745. A horse at a public auction was warranted sound, and six years old; and one of the conditions was, that he should be deemed sound unless returned within two days; held that the plaintiff might recover for breach of warranty, on discovering that the horse was twelve years old ten days after the sale.

(e) *Adam v. Richards*, 2 H. B. 573.

(f) *Ibid*.

The keeping a warranted article for a length of time without objection, and selling part, is evidence tending to prove that it corresponded with the warranty (g).

A *scienter*, though alleged, need not be proved (h).

The breach of warranty must be proved according to the allegations in the declaration (1). Upon the question, what constitutes unsoundness in a horse, there are many and conflicting authorities (i) (2).

* Upon a warranty of a horse, that he is a good drawer, * 1666.

(g) *Prosser v. Hooper*, 1 Moore, 106. Especially where the price was low. *Ibid.* *Vide supra*, 647.

(h) *Williamson v. Allison*, 2 East, 246.

(i) Eyre, C. J. held that a temporary lameness was not to be considered an unsoundness (*Garment v. Barrs*, 2 Esp. C. 673). In the case of *Bassett v. Collis* (2 Camp. 523), it was held to be insufficient to show merely that a horse warranted sound is a *roarer*, inasmuch as roaring may be merely from a bad habit; and that to prove a breach of warranty, it must be shown to be symptomatic of disease or infirmity. But in *Elton v. Jordan*, 1 Starkie's C. 127. [S. C. 4 Camp 281, by the name of *Elton v. Brogden*.] Lord Ellenborough held that any infirmity which rendered the horse less fit for present use or convenience, though not of a permanent nature, and although removed after action brought, was an unsoundness. In *Skillico v. Claridge* (2 Chitty's R. 425), it was held that a cough, not of a temporary nature, was an unsoundness. And in the case of *Onslow v. Eames*, (2 Starkie's C. 81), where it was proved by an experienced veterinary surgeon, that roaring is occasioned by a constriction of the neck of the windpipe, which renders it too narrow for accelerated respiration; and that the disorder is frequently produced by soreness of the throat, or some other topical inflammation; and that the disorder itself was of such a nature as greatly to incommode a horse when pressed to his speed; Lord Ellenborough held that this was an unsoundness. Crib-biting, it is said, is not indicative of unsoundness (*Brannenburgh v. Haycock*, Holt's C. 630). With respect to *thrushes*, *splints*, and *quidding*, a diversity of opinion prevails. 2 Camp. 524, n.

(1) [In an action of covenant, evidence that the defendant knew the article, sold and covenanted to be sound, was unsound, is not admissible. *Shackleford v. Gooch*, 1 Bibb, 583. Where the plaintiff grounds his action on deceit or fraud in the sale, and not on breach of contract, the deceit or fraud must be substantially alleged in the declaration; otherwise no proof of fraud is admissible. *Executors of Evertson v. Miles*, 6 Johns. 138. Under a declaration for money had and received, &c. the plaintiff cannot give in evidence fraud and misrepresentation in the sale of a chattel. *Read v. Duncan*, 2 M'Cord, 167. In an action on the case, on the warranty of soundness of a slave, a bill of sale under seal, containing such warranty, is not admissible. *Hickman v. Hanley*, 4 Bibb, 359.]

(2) [A slight or temporary defect, in a horse warranted, will not authorize the rescission of the contract, or the recovery back of the price paid. *Rivers v. Grugel*, 2 Nott & M'Cord, 265.]

PART
IV.

Damages.

and would pull quietly in harness, proof that he is a good drawer merely is insufficient (*l*).

The plaintiff is, in general, entitled to recover in respect of all losses which have resulted immediately from the breach of warranty. In an action upon a warranty of a chain-cable, it was held that the plaintiff might recover the value of an anchor which was lost through the insufficiency of the cable, proof being given that the ship would have been lost if the anchor had not been slipped (*m*).

If a warranted horse has been returned, the measure of damages is the price paid (*n*). If he has not been returned, the measure of damages is the difference between his real value and the price paid (*o*). If he has not been tendered, the plaintiff cannot recover the expenses of his keep (*p*).

* 1667 Where *A.* sold and warranted a horse to *B.*, and *B.* sold him to *C.*, and *C.* recovered the price from *B.* in * an action, of which *A.* had notice, it was held that *B.* was entitled to recover from *A.* not only the price of the horse, but the costs of the action brought by *C.* (*q*).

In an action for goods warranted, which do not answer the warranty, but which have not been returned, the vendor cannot recover more than the real value (*r*).

Money had
and received.

Where the contract of warranty remains still open, or, in other words, where the breach of warranty remains to be tried, the plaintiff cannot recover as for money had and re-

(*l*) *Coltherd v. Puncheon*, 2 D. & R. 10.

(*m*) *Borradaile v. Brunton*, 2 Moore, 582. 8 Taunt. 535. [See *Lightner v. Martin*, 2 M'Cord, 214.]

(*n*) *Caswell v. Coare*, 1 Taunt. 566.

(*o*) *Ibid.* and *supra*, 646.

(*p*) 1 Taunt. 566. Where the vendor rescinds the contract, he is liable to the vendee for the keep. *King v. Price*, 2 Chitty's R. 416.

(*q*) *Lewis v. Peake*, 7 Taunt. 153; 2 Marsh. 431. See *Green v. Greenbank*, 2 Marsh. 485. Lord Alvanley (in the case of *Briggs v. Crick*, 5 Esp. C. 99; *supra*, 1647.) is stated to have ruled that a former vendor with a warranty was a competent witness for a subsequent vendor on an action on a warranty by the latter.

(*r*) [See *Egleston v. Macauley*, 1 M'Cord, 379. *Work v. Grier*, Addison's Rep. 375.] *Supra*, 645. As, where the goods sold by sample do not correspond with the sample. *Germaine v. Burton*, Cor. Bayley, J. York Spring Assiz. 1821. And see *Basten v. Butter*, 7 East, 479. Where the plaintiff warranted a horse to be sound, knowing him to be unsound, and the buyer gave a bill of exchange for the price, and afterwards discovering the unsoundness, tendered him to the plaintiff, who refused to take him, it was held that he was precluded by his fraud from recovering on the bill. *Lewis v. Cosgrave*, 2 Taunt. 2.

ceived to his use ; but where, either by the terms of the contract, or by the assent of the vendor, it is rescinded, the action for money had and received is maintainable (s).

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Where a horse was warranted sound, and the vendor, in a subsequent conversation, promised, if the horse were unsound he would take it back and return the money, it was held, that though the horse turned out * to be unsound, * 1668 the vendor could not maintain *assumpsit* for the price, for the subsequent promise did not discharge the original warranty (t).

WASTE.

IN an action on the case, in the nature of waste, the plaintiff must prove 1st. His interest, and the holding by the defendant, as alleged ; 2dly. The waste complained of (1) ; and 3dly. The amount of the damage.

(s) *Towers v. Barrett*, 1 T. R. 133 ; *Power v. Wells*, Cowp. 818 ; *Weston v. Downs*, Doug. 23. So one who exchanges a watch for goods falsely warranted to be silver, cannot maintain trover without showing fraud. *Emanuel v. Dane*, 3 Camp. 290 ; *supra*, 1646.

(t) *Payne v. Whale*, 7 East, 274.

(1) [The law of waste is not to be held precisely in the same manner in this country as in England. It must be varied and accommodated to the circumstances of our new and unsettled condition. *Findlay v. Smith*, 6 Munf. 134. *Jackson v. Brownson*, 7 Johns. 227. Where wild and uncultivated land, wholly covered with wood and timber, is leased, the lessee may fell part of the wood and timber, so as to fit the land for cultivation, without being liable for waste ; but he cannot cut down the whole, so as permanently to injure the inheritance : And to what extent the wood and timber on such land may be cut down without waste, is a question of fact for a jury to decide, under the direction of the court. 7 Johns. *ubi sup.* In Massachusetts, however, it is held that a widow cannot have dower in wild and uncultivated land, because she can have no benefit from it except by cutting the wood, which would be waste and incur a forfeiture. *Conner v. Shepherd*, 15 Mass. Rep. 164. It is not waste to clear tillable land for the necessary support of a family, though the timber be destroyed in the clearing ; nor to cut wood for fences, necessary buildings, &c. But it is waste to collect together light-wood for the purpose of making tar. *Parkins v. Cox*, 2 Hayw. 339. *Ballentine v. Poyner*, *ibid.* 110. It is not waste in a tenant in dower of coal lands, to take coal to any extent from a mine already opened, or to sink new shafts into the same veins of coal ; and such tenant may penetrate through a seam already opened, and dig into a new seam that lies under the first. *Crouch v. Puryear*, 1 Randolph, 258. Nor is it waste in a tenant in dower, to clear woodland assigned to her, provided she does not exceed the relative proportion of cleared land considered as to the whole tract. *Hastings & al. v. Crunkleton & al.*, 3 Yeates, 261. Where a tenant, by altering the course of

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IV.

* It is no defence to show that the defendant has covenanted to yield up the premises in repair (e).

Defence.

class, where the building was erected as a mere accessory to a chattel, were held to be removeable; but those of the latter class, which were accessory to the freehold itself, were considered to be irremovable.

In the case of *Dean v. Allalley* (3 Esp. C. 11), Lord Kenyon seems to have considered erections for the purposes of farming to be on the same footing with those made for the purposes of trade; but this was much doubted by Lord Ellenborough, in the subsequent case of *Elwes v. Maw*, 3 East, 57.

In *Fitzherbert v. Shaw* (1 H. B. 258), Gould, J. expressed an opinion at the trial that a tenant from year to year might during the term remove a wooden stable placed on blocks or rollers, or a shed or brick-work which he had erected; but ultimately the question turned upon an agreement entered into between the parties.

In *Penton v. Robart* (2 East, 88), it was held that the tenant was justified in removing a building constructed of wood, and erected on a foundation of brick, for the purposes of trade, after the expiration of the term. And a barn put upon pattens, or blocks of timber lying upon the ground, but not fixed in or to the ground, may be removed by the tenant; for they are not fixtures. Per Lord Ellenborough, 3 East, 56; *Culling v. Tuffnail*, B. N. P. 34.

In *Horn v. Baker* (9 East, 215), it was held that the stills of a distiller, which were fixed to the freehold were not *goods and chattels* within the stat. 21 Jac. 1. c. 19, s. 10 & 11; but that vats and utensils, which were not so fixed, were within the statute. Parts of a machine put up by a tenant during the term, i. e. certain jibs which were placed in cases and steps affixed to a warehouse, but which jibs were fastened by pins above and below, and capable of being removed without injury either to the cases and steps, or the building, and which were articles usually valued between out-going and in-coming tenants, were held to be the chattels of the out-going tenant, for which he might maintain trover. *Davis v. Jones*, 2 B. & A. 165.

A tenant may during his term remove matters of ornament, such as ornamental marble chimney-pieces, pier-glasses, hangings, swains-cots fixed only by screws, and the like (*Beck v. Rebow*, 1 P. Wms. 94; *Ex parte Quincey*, 1 Atk. 477; *Lawton v. Lawton*, 3 Atk. 13). But although a tenant occupy a house for the purpose of trade, and may, according to the general rule, remove vats set up in relation to trade (per Lord Holt, *Poole's case*, 1 Salk. 368), yet he cannot remove that which is affixed to complete his house, as hearths and chimney-pieces. Per Holt, C. J. *ibid.* and per Lord Ellenborough, in *Elwes v. Maw*, 3 East, 53.

A tenant cannot remove fixtures after giving up the possession. Per Gibbs, C. J. in *Lee v. Risdon*, 7 Taunt. 188. 2 Marsh. 495.

Where a conservatory was built on a foundation of brick, communicating with the dwelling-house, the windows of which opened into it, it was held to be waste in a tenant for life who removed it. *Buckland v. Butterfield*, 2 B. & B. 54.

A les-

(e) *Kenyside v. Thornton*, 2 Bl. R. 1111; 2 Will. Saund. 252. c. [Regula Placitandi, 271.]

* WATER-COURSE.

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If a stream of water run through the land of *A.*, and thence through the contiguous close of *B.*, and **A.* has for the space of twenty years used a portion of the stream for particular purposes, such enjoyment will be *prima facie* evidence of a legal title in *A.* so to appropriate that portion of the water (*f*) (1). But such evidence is liable to be rebutted by contradictory or explanatory evidence (*g*).

Evidence of
title.
* 1672
Proof of right.

A lessee of premises, for the purpose of trade, puts up fixtures, and takes a new lease, in which he covenants to repair; he is, it seems, bound to repair those fixtures. *Thresher v. London Water-works Company*, 2 B. & C. 608. *Qu.* Whether lime-kilns erected for purpose of trade be removeable. *Ibid.*

Buildings erected for purposes of trade cannot be removed where the lessee covenants to repair the erections and buildings erected during the term, and the said premises so repaired, &c. to leave and yield up at the end of the term, *Naylor v. Collinge*, 1 Taunt. 19; per Abbott, C. J. 2 B. & C. 614.

(*f*) *Bealey v. Shaw*, 6 East, 214. A mortgagor in possession of the premises mortgaged is tenant to the mortgagee, and may be so described in a declaration for an injury to the reversion. *Partridge v. Dyson*, 5 B. & A. 604.

(*g*) *Supra*, 1217. Where a plaintiff had enjoyed a spring and stream of water issuing out of his own grounds for twenty years, and the defendant, by opening a quarry in his own adjoining lands, intercepted the spring, it was held to be no answer to the action that a grant could not be presumed, inasmuch as the existence of the water-course through the defendant's land had been but recently discovered; and Lord Ellenborough held that the enjoyment for twenty years afforded conclusive evidence of right. *Balston v. Bensted*, 1 Camp. 463. If, however, such a right really depended upon the presumption of a grant, the evidence of twenty years' enjoyment could scarcely be considered to be conclusive. *Qu.* therefore, whether the right in such a case does not depend on other principles.

Mutual benefit is evidence of an agreement. If two men have property near a river, and each has land between the property of both and the river, and they cut through each other's ground for water, and that continues for twenty years, an agreement is to be presumed. Per Lord Cowper, 12 Vin. Ab. Q. a. pl. 8, cites *G. Eq. R.* 4 Hil. 6 Ann.

An user of the banks of a river by fishermen for more than twenty years, with evidence of their having levelled and improved the landing place, affords presumptive evidence of a grant to the lessees of the fishery in a public navigable river. *Gray v. Bond*, 2 B. & B. 667. Although both the fishery and landing place once

(1) [See, on this subject, *Ingraham v. Hutchinson*, 2 Conn. Rep. 584. *Curtis & al. v. Jackson*, 13 Mass. Rep. 514. Angell on Water-courses, ch. IV. sec. 5. ch. VII. sec. 4.]

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Proof of right.

And it will be evidence to the extent only of the portion of water actually appropriated.

Thus, if *A.* erect a weir, of the height of three feet, and *B.* having in the mean time appropriated the surplus water flowing over the first weir, *B.* may maintain an action against *A.* for thus heightening the weir (*h*).

- * 1673 * Where a mill has been erected on a stream for a long period of time the owner has a right that the water shall continue to flow from his mill over the land of another, in

belonged to the same person, (*ib.*) and although there was no evidence to show that the former owner, or those who claimed under him, knew that the shore had been so used.

Where a grant of wreck was made by H. 2, and confirmed by H. 8, to the proprietor of land on the coast, who within forty years had constructed an embankment across a small bay to reclaim sea-mud, and had since exerted an exclusive right to the soil without opposition, it was held, that from such usage, anterior usage might be presumed; and that the usage, coupled with the terms of the grant, served to elucidate it, and to establish the right so asserted, *Chad v. Tilsed*, 2 B. & B. 403.

(*h*) *Bealey v. Shaw*, 6 East, 214. The persons under whom the defendants claimed had eighty years since erected a mill, and made a weir to divert the water from the river Irwell, which weir had at various times before 1787 been enlarged. In 1787 the plaintiff built a mill lower down the stream, which was supplied by the water not then taken by the defendants' weir, and continued to enjoy the surplus water till 1791, when the defendants so enlarged their weir and extended their works as to take all the water from the plaintiff's mill. The Court held the action to be maintainable. Lord Ellenborough said, that twenty years exclusive enjoyment of water in any particular manner affords a conclusive presumption of right in the party so enjoying it; but less than twenty years may or may not afford such a presumption, according as it is attended with circumstances to support or rebut the right. And in the same case *Le Blanc, J.* said, "The true rule is, that if after the erection of works, and the appropriation by the owner of land of a certain quantity of water flowing over it, the proprietor of other lands takes what remains of the water before unappropriated, the first mentioned owner, however he might before such second appropriation have taken to himself so much more, cannot do so afterwards." And see the observations of *Holroyd, J.* *Ib.*

And it should seem, that if *A.* appropriated at any time any portion of the water which had always been accustomed to run through the land of *B.* so as to diminish the quantity of water passing through *B.*'s land, and thereby to diminish the value of *B.*'s land, *B.* might maintain an action against *A.*, although an enjoyment of the water so diverted by *A.* for twenty years would be *prima facie* evidence of the title, and an answer to the action. In other words, it seems that *A.* could not by the mere act of appropriation diminish the quantity of water which ran through *B.*'s land to the prejudice of his estate in point of value, although enough was still left to *B.* for the purposes for which he had actually used the water.

the same manner that it has done during all that time (i). And it is no defence that the owner has, within the last twenty years, substituted a new wheel, which requires less water than the old one (k).

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IV.

Proof of right.

* 1674

* Although an adverse enjoyment for the space of twenty years is, as against a private individual, evidence of a grant by him, yet it is otherwise in the case of a public river navigable by all the king's subjects; no obstruction for twenty years will bar a public right (l).

Ownership of the soil is *prima facie* evidence of a right of fishery.

Where a river is not navigable, the presumption is that the soil is the property of the owners on each side, to the middle of the river (m) (1). But in the case of a navigable

(i) *Saunders v. Newman*, 1 B. & A. 258.

(k) *Ibid.* See *Luttrell's case*, 4 Rep. 86; *supra*, 1213. If a mill-head pens back the water upon the adjoining lands and injures them, but in consequence of defective construction, and want of repair in the wheels and waste-gates, the mill-pond is by the working of the mill, at seasons wholly selected by the miller, without the control of the land-owner, so soon and so frequently exhausted, that the adjoining lands are frequently relieved from the stagnant water, and suffer but small damage, the miller (*it seems*) is justified in repairing and improving the construction of his mill, and thereby penning the water back on his neighbour's lands for longer periods, although he thereby occasions greater damage to him. *Alder v. Savill*, 5 Taunt. 454.

(l) *Vooght v. Winch*, 2 B. & A. 662; *Weld v. Hornby*, 7 East, 195. Whether a river be navigable or not is of course a question of fact for the Jury (*Vooght v. Winch*, 2 B. & A. 662). The flux or reflux of the tide is evidence of a navigable river (*Miles v. Rose*, 1 Marsh. 313. 5 Taunt. 705), but not conclusive. (*Ibid.*) It was held in that case that the cutting of rushes in the creek by strangers, and without interruption, was a strong circumstance to show that the river was public. The fact that pleasure-boats were accustomed to sail up the creek was also relied upon, by Gibbs, C. J.

The public are not entitled of common right to tow on the banks of ancient navigable rivers (*Ball v. Herbert*, 3 T. R. 253); or to use the sea-shore for bathing; or to cross the sea-shore on foot, or with machines for that purpose. *Blundell v. Catterall*, 5 B. & A. 268, Best, J. *dissent*.

(m) *Carter v. Murcot*, 4 Burr. 2162. [*Arnold v. Mundy*, 1 Halsted's Rep. 1. *The People v. Platt*, 17 Johns. 195. *King v. King*, 7 Mass. Rep. 496.]

(1) [When a river is the boundary between two nations or States, if the property is in neither, and there is no convention respecting it, each holds to the middle of the stream. But when one State is the original proprietor, and grants the territory on one side only, it retains the river within its domain, and the newly erected State extends to the river only, and the low water mark is its boundary. *Handly's Lessee v. Anthony & al.* 5 Wheat. 374.]

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IV.

river, the presumption is that the soil is vested in the Crown. Yet a subject may claim a prescriptive right to a several fishery in an arm of the sea, even against the Crown (n).

* 1675 * Proof of the very act of fishing in the *locus in quo*, is evidence of the right, although it be not proved that fish were actually caught (o).

Former
verdict.

It has been seen that a verdict for the defendant in a former action, for diverting water from his mill is evidence, but not conclusive, for the defendant in a second action (p).

So a verdict for the plaintiff, in an action for obstructing his barges in a *navigable* river, is strong, but not conclusive, evidence, in an action for a similar obstruction (q).

Variance.

An action for obstructing a water-course is local in its nature (r), but a local description is unnecessary (s).

An allegation that the plaintiff, by reason of his possession of a mill, with the appurtenances, was entitled to the use of water running in a certain tunnel to the mill, is not supported by proof that the tunnel was made on the defendant's land, upon an agreement by the latter to convey the right, no conveyance having in fact been made, and the defendant's * assent having been refused, for the plain-

* 1676

(n) *Mayor of Orford, &c. v. Richardson*, 4 T. R. 439. A man may prescribe for a several fishery in a navigable river without showing a grant from the Crown (*Rogers v. Allen*, 1 Camp. 312); and a several fishery in a navigable river is divisible; it may be abandoned to the public as to the taking of floating fish, and preserved as to the dredging for oysters. *Ibid.* [See *Pitkin v. Olmsted*, 1 Root, 217. *Carson v. Blazer*, 2 Binney, 475. *Hooker v. Cumming*, 20 Johns. 90. *Peck v. Lockwood*, 5 Day, 21. *Lay v. King*, *ibid.* 72. *Adams v. Pease*, 2 Conn. Rep. 481. *Chalker v. Dickinson*, 1 Conn. Rep. 382.]

(o) *Patrick v. Greenway*, 1 Will. Saund. 346, b. Hence it is said that the very act of fishing is sufficient damage to support an action for disturbance of the plaintiff's right. *Ibid.* For wherever an act injures another's right, and would be evidence in favour of the wrongdoer, an action may be maintained for an invasion of the right, without proof of any specific injury. *Ibid.* And see *Wells v. Walling*, 2 Bl. R. 1283; *Hobson v. Todd*, 4 T. R. 71; and the above case of *Patrick v. Greenway*. Note; that in the last case the action was in trespass.

(p) *Vooght v. Winch*, 2 B. & A. 662; *supra*, 1279; and Vol. I. p. 206.

(q) *P. C. Miles v. Rose*, 5 Taunt. 705. 1 Marsh. 313.

(r) *Mersey and Irwell Navigation v. Douglas*, 2 East, 497.

(s) *Ib. & supra*, 1570.

tiff had not the right by reason of possession, but under a parol license, revocable in its nature, and in fact revoked (t).

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Competency.

Where issue is joined on a traverse, that a stream of water has from time immemorial been accustomed to flow in a specified course, one who claims a right of water, which depends upon the prescription alleged, is it seems incompetent as a witness, upon the same principle that a commoner cannot by his evidence support a custom beneficial to himself; but it is otherwise where a right of water is claimed by prescription as appurtenant to a particular messuage (u).

WAY.

A RIGHT of way exists either by prescription or grant, or other agreement, or license, or from necessity (x). And the evidence is either direct, by proof of an existing grant (y), or presumptive.

(t) *Fentiman v. Smith*, 4 East, 107.

(u) *Jebb v. Povey*, 2 Esp. C. 679; *supra*, 391.

(x) *Infra*, 1678.

(y) A lease of a house and land adjoining, with all ways, with the said premises, or any part thereof used or enjoyed before, entitles the lessee to a right of way which a tenant of the whole of the yard, before and at the time of the lease, used and enjoyed to every part of the yard. *Kooystra v. Lucas*, 5 B. & A. 830—(1).

A lease of premises describes them as abutting on an intended

(1) [Where land is conveyed, with a right to the grantee, his heirs and assigns, to pass over the land, the right is appurtenant to every part of the land so conveyed, and the grantee of any part is entitled to it. *Watson v. Bioren*, 1 Serg. & Rawle, 227. But if the owner of two adjoining closes, over which ways have been used by him, convey one of the closes, the ways will not pass under the words "all the privileges and appurtenances thereto belonging"—except, perhaps, ways of necessity. *Grant v. Chase & al.* 17 Mass. Rep. 443. A way in gross may be granted to one and his heirs, or it may accrue to him and his heirs by a reservation in his own deed conveying the land in which the way is reserved. *White v. Crawford*, 10 Mass. Rep. 183. Where by a levy on part of a debtor's land, the residue was divided into two parcels, one of which, lying north, was thereby excluded from the highway, but the other, lying northerly as well as westerly, was bounded on the highway; it was held that a way reserved in the levy, from the land "north of the land extended on, adjoining the same," was appurtenant to the first parcel only. *Russell v. Jackson*, 2 Pick. 574. Where a deed conveys land as bounded on a way upon one side, this is not merely a description, but an im-

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* The nature of the presumptive evidence requisite to prove a right of way by prescription (z) or grant (a), over

way, thirty feet wide, not then set out, the soil of which was the property of the lessor; the lessee grants an under-lease, describing the premises as abutting on an intended way, without specifying the breadth; the sub-lessee is entitled to a convenient way only. *Harding v. Wilson*, 2 B. & C. 96. 3 D. & R.—S. C.

If a man seised of Blackacre and Whiteacre uses a way through Whiteacre to Blackacre, and then afterwards grants Blackacre with all ways, the way through Whiteacre will pass to the lessee. (Com. Dig. tit. Chemin, D. 3). So if he be seised of two acres, to which a way is appurtenant, and grants one acre with all ways, &c. the way will be granted (Cro. Jac. 121, 122. 170; 6 Mod. 3). So if a lessor, having used convenient ways over adjoining land during his own occupation, demise premises with all ways appurtenant unless it be shown in evidence that there was some way appurtenant in *alieno solo* to satisfy the words of the grant, the ways shall pass although they be misnamed appurtenant, the easement having been destroyed by unity of possession. *Morris v. Edgington*, 3 Taunt. 24. But where one seised in fee of the adjoining closes A. and B., over the former of which a way had been immemorially used to the latter, devised B. with the appurtenances, it was held that the devisee could not claim the right of way over A., for the old way was extinguished by unity of possession, and no new way was created. *Whalley v. Thomson*, 1 B. & P. 371.

A grant of a free and convenient way for the purpose of carrying coals gives a right to lay a framed waggon-way (*Senhouse v. Christian*, 1 T. R. 560). But a grant of a way from A. to B. in, through, and along a particular way, does not justify the grantee in making a transverse road. *Ibid.* [2 Pick. 577.] A right to repair

(z) *Supra*, 1204.

(a) *Supra*, 1214.

plied covenant that there is such a way. *Parker & al. v. Smith & al.* 17 Mass. Rep. 413.

By accepting a deed conveying ground adjoining an alley and court, together with the use of the alley, in common with the grantor, "and his tenants and occupiers of the adjoining ground, as also of his (the grantor's) other ground bounding on the said court," the grantee is estopped to deny the right of way through the alley, to the occupiers of the ground adjoining the court, but not adjoining the alley; though at the time of the execution of the deed, the grantor had no right to grant a passage through the alley, as appurtenant to ground adjoining the court, but not adjoining the alley. And though the grantor and grantee could not grant a right of way through the alley as appurtenant to any ground not adjoining it, without the consent of the owners of the land on the opposite side of the alley, yet the estoppel operates on one who, with full notice on the face of his deed, purchases land on that side of the alley, of the grantee, who, after the execution of the first mentioned deed, became the owner of the land on both sides of the alley. *Ewing v. Desilver*, 8 Serg. & Rawle, 92.]

the lands of another, has already been considered. The general rule, it has been seen, is, that an uninterrupted enjoyment of such an easement for the space of twenty years, unanswered and unexplained, affords presumptive evidence of title (b) (1); * a presumption which may be repelled by evidence which accounts for the possession, without resorting to a title by grant or otherwise.

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Proof of title.

* 1678

Where the right is claimed *ex necessitate*, it is of course essential to prove the particular facts and circumstances which in point of law support such a right; as, that the claimant purchased land to which there is no access but over the land of the vendor, for then the law implies a grant of a right of way *ex necessitate* (c).

So also, where one having three closes sells the two extremes, a road to the middle one is reserved by operation of law (d) (2).

pair is incident to a grant of a way. 1 Saund. 323. *Gerrard v. Cooke*, 2 N. R. 109.

Where a private act of parliament for inclosing the waste lands of a manor reserved to the lord all mines, together with all convenient and necessary ways then already made, or thereafter to be made, with liberty of making waggon-ways at his free will and pleasure, and to do such other acts as might be necessary for the full and complete enjoyment thereof in as full, ample and beneficial a manner as if that act had not been made; in an action of trespass against an assignee of the lord for making a way, it was held, that the question for the Jury was not whether the road had been made in the direction and in the manner least injurious to the owner of an allotment, or in that direction, or by that mode which a strict necessity would have pointed out; but whether the direction chosen has been such as a person of reasonable and ordinary skill and experience would have selected before hand, and whether the mode adopted has been such as a prudent and rational person would have adopted, if he had been making a road over his own land, and not over the land of another. *Abson v. Fenton*, 1 B. & C. 195.

(b) *Supra*, 1215; *Campbell v. Wilson*, 3 East, 294. *Supra*, 1218, note (n). [*Hill v. Crosby*, 2 Pick. 466.]

(c) *Houton v. Frearson*, 8 T. R. 50. Even although the vendor was but a trustee, *ib.*; and see *Roberts v. Karr*, 1 Taunt. 495.

(d) *Per. Cur.* *Clarke v. Cogge*, Cro. Jac. 170, 2 Roll. Ab. pl. 60.

(1) [A right of way, whether gained by prescription, by a grant, or by a reservation, is not lost by a non-user for twenty years. *White v. Crawford*, 10 Mass. Rep. 183. See Jenk. 12. 2 Inst. 653. Co. Lit. 114. b. Yelv. 142, note (1). Vaugh. 341. But an adverse possession and occupation for twenty years is *prima facie* evidence of an extinguishment of a right of way. *Hoffman v. Savage & al.* 15 Mass. Rep. 130.]

(2) [A right of way of necessity exists only when the person

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If a man having a right of way over the close *A.*, for the occupation of his close *B.* purchase an adjoining close *C.*, he cannot use the way for the occupation of the latter close (*e*).

Evidence of the user of a road tends only to proof of a right commensurate with the usage (*f*).

A right to use the way for carts and horses only will not justify the use of the way as a drift-road for cattle (*g*), although proof of usage of the way for carts and horses, may, coupled with circumstances, afford evidence of a drift-way (*h*).

- * 1679 * So a right of way for agricultural purposes will not justify the party in using it for a lime quarry newly opened (*i*).

pl. 17. *Houghton v. Frearson*, 8 T. R. 50. A person having a private way cannot justify going over the land adjoining *Taylor v. Whitehead*, Doug. 744. *Ballard v. Harrison*, 4 M. & S. 387.

If a person has a way through a close in a particular direction, and he afterwards purchase other closes adjoining, he cannot extend the way to those closes, 1 Roll. 391; 1 Mod. 190. [1 Freem. 247.]

A way of necessity exists after an unity of possession, which would otherwise have extinguished the way and a subsequent severance. *Buckby v. Coles*, 5 Taunt. 311.

(*e*) *Laughton v. Ward*, Lutw. 111. [See *Watson v. Bioren*, 1 Serg. & Rawle, 227.]

(*f*) See *Ballard v. Dyson*, 1 Taunt. 279. *Infra*, 1679.

(*g*) 1 Taunt. 279.

(*h*) *Ballard v. Dyson*, 1 Taunt. 279.

(*i*) *Jackson v. Stacey*, Holt's C. 455; Cor. Wood, B.

claiming it has no other means of passing from his estate into the public street or road. When a man grants land surrounded by land of his own, which he retains, he tacitly grants a right of way—it being necessary to the use and enjoyment of the land granted. But one who voluntarily takes a conveyance of land, surrounded by lands of his grantor and others, cannot enforce a right of way under the plea of necessity against any one but him who conveyed to him. Per Parker, C. J. *Gayetty v. Bethune*, 14 Mass. Rep. 49.

Where one living on an island had a navigable water-course from his own door to the highway, of no greater distance than the passage through his neighbour's field, it was held that there was no such necessity as to give him a right of way over the field. *Lawton v. Rivers*, 2 M'Cord, 444.

If a part of one's lands be extended on execution, so as to leave him no way to and from the remainder, but over the land extended upon, the law will give it to him as a way of necessity. *Pernam v. Wead*, 2 Mass. Rep. 203. *Taylor v. Townsend*, 8 ib. 411. Where a way of necessity to part of a debtor's land results from successive levies on other parts, the land of the creditor, whose levy creates the necessity, must be burdened with the easement. *Russell v. Jackson*, 2 Pick. 574.]

The grantee of a private way over the lands of another may maintain an action on the case for obstructing the way, although the public have used it for the last thirteen years (*k*) (1).

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As in pleading a right of private way, the nature of the way (*l*), and also the *termini* (*m*), must be described; a variance in these respects, on issue taken on the right, will be fatal (*n*).

Variance.

An allegation that a cottage, to which a right of way is claimed as appurtenant, is in the possession and occupation of the plaintiff, is satisfied by evidence that one part is occupied by his servant, although he receives less wages on account of his occupation, and although other part is let to a tenant (*o*).

So an averment, that the defendant being seised of a copyhold, used the way, includes an using of the way as landlord, and in order to assert his right in that character, although the copyhold was in the occupation of a tenant; for it comprehends all purposes for which a landlord seised of the tenement may lawfully use the way, to view waste, demand rent, or to remove an obstruction (*p*).

Where issue is taken on a prescriptive right, claimed * as appurtenant to an ancient messuage, the defendant is * 1680 not bound to prove his occupation of the messuage, but is entitled to a verdict, on proof of the prescription, as claimed, although the messuage is in the occupation of a tenant,

(*k*) *Allen v. Ormond*, 8 East, 4.

(*l*) *Alban v. Brounsall*, Yelv. 163. [& note to the American ed.] For being granted for particular purposes, the justification must show that they were used for those purposes. Per Wilson, J. in *Rouse v. Bardin*, 1 H. B. 351. *Secus*, in case of a public way. *Aspindall v. Brown*, 3 T. R. 265. [*Commonwealth v. Inhabts. of Newbury*, 2 Pick. 51.]

(*m*) *Rouse v. Bardin*, 1 H. B. 351. 2 Leon. 10. Hob. 190. *Secus*, in the case of a public way, 1 H. B. 351.

(*n*) *Supra*, 662; and see tit. *Variance*.

(*o*) *Bertie v. Beaumont*, 16 East, 33. See *R. v. Stock*, 2 Taunt. 339.

(*p*) *Proud v. Hollis*, 1 B. & C. 8.

(1) [The grantee of land subject to a right of way is entitled to the benefit of an agreement in relation to that right, made between those from whom he derives title and those who claim the right of way; and in an action against him for disturbing the right of way, he may give such agreement in evidence. *Greenwalt & al. v. Horner & al.* 6 Serg. & Rawle, 71. And his grantor, who conveyed with general warranty, is a competent witness for him to prove such agreement. *ibid.*]

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and although the defendant is the occupier of a new house, and has used the road for the purposes of such occupation (*p*); for by traversing the prescription, the seisin of the defendant, as alleged, is admitted, and the right only is put in issue (*q*).

If the plaintiff intended to deny the seisin, he ought to have traversed it; if he meant to insist that the occupation was in another, he ought to have replied the fact, admitting the seisin (*r*); if he intended to contest the right of the defendant to use the road as a way to the new house, he ought to have admitted the claim, and pleaded that the trespass complained of was committed *extra viam* (*s*).

Defence.

Unity of possession of the land to which the way is claimed as appurtenant, with the land over which the way lies, extinguishes the way; for it is an answer to the prescription, and the way is against common right (*t*).

(*p*) *Stott v. Stott*, 16 East, 343.

(*q*) *Ibid*.

(*r*) The Court held in the same case, on motion in arrest of judgment, that the allegation of *seisin*, *prima facie* implied occupation, unless the contrary were shown in pleading.

(*s*) *Ibid*.

(*t*) [See *Gayetty v. Bethune*, 14 Mass. Rep. 49. *Grant v. Chase & al.* 17 ib. 443. *Hoffman v. Savage & al.* 15 ib. 130.] 1 Roll. Ab. 935; 3 T. R. 157; 3 East, 295. *Whalley v. Thomson*, 1 B. & P. 371. *Buckby v. Coles*, 5 Taunt. 311. Claim of prescriptive right of way from the close *A*. over the defendant's close *D*. unto the village of *Allesley*; it appeared in evidence that the way claimed was from *A*. over the defendant's close *B*., and from thence over the defendant's close *C*., and from thence over the close *D*., and from thence into *Allesley*; and that the owner of the close *A*. had about eighteen years; being also owner of the close *D*., conveyed it to a stranger in fee, without reserving any right of way: and it was held that the right of way over *D*. was thereby extinguished, and consequently that an action did not lie against the defendant for obstructing the plaintiff's passage by putting up a gate on one of his own closes. *Wright v. Rattray*, 1 East, 377.

In *Slowman v. West*, (Palm. 387; 2 Roll. R. 397), Doderidge, J. said, that if a man had a right of way from his house to church, and the close next his house over which the way leads is his own, he cannot prescribe for a right of way from his house to the church, because he cannot prescribe for a right of way over his own land. Ley, C. J. and Chamberlayne, J. differed from him; but Lord Kenyon (in *Wright v. Rattray*) approved of Mr. J. Doderidge's opinion, saying that he was a whole host in himself.

In *Jackson v. Shillito* (Trin. 32 Geo. III. K. B. cited in *Wright v. Rattray*, 1 East, 377), the defendant in trespass *quare clausum fregit*, prescribed for an occupation-way from his own close, into, through and over the *locus in quo* to and unto a certain highway, &c. and it appeared that one of the several intervening closes was in the possession of the defendant himself; it was held by the

* WILLS (u).

By the enactment of the Statute of Frauds, 29 Car. II. c. 3. s. 5, all devises and bequests of any lands or tenements, devisable either by the Statute of Wills (x), or by force of the custom of Kent, or the custom of * any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express direction, and shall be attested and subscribed in the presence of the said devisor, by three or four credible witnesses, or else they shall be utterly void, and of none effect (1). Statute of Frauds. * 1682

Court of C. B. (contrary to the opinion of Lord Kenyon at the trial), that it was sufficient. But there (per Lord Kenyon, 1 East, 381) the defendant had in fact a right to go the whole line of road; whereas in *Wright v. Rattray* he had no right to go part of the road claimed. And in *Wright v. Rattray* Lord Kenyon seems to have been of opinion that it would have been sufficient if the plaintiff had merely claimed a right of way over the defendant's close towards Allesley.

(u) As to proof of a will of personalty, *vide supra*, tit. *Executor*, 549; for proof of a will of copyhold, *vide supra*, tit. *Copyhold*, 416. 519. Where a feme covert and her husband surrender to the use of her will, she must be examined separately (*Driver v. Thomson*, 4 Taunt. 295); and no special custom to that effect is necessary (*Doe v. Clifford*, York Sum. Ass. 1821, Cor. Bayley, J.) She ought to be examined before the steward of the Court (4 Taunt. 294; *Erish v. Rives*, Cro. Eliz. 717). But an examination before two tenants of the manor is good by custom. *Ibid*.

(x) 32 Hen. 8. c. 1, explained by stat. 34 Hen. 8. c. 5.

(1) [In Pennsylvania, two witnesses are required in proof of every testamentary writing, whether for the disposition of real or personal property. *Lewis v. Maris*, 1 Dallas, 278. But to constitute a valid will of land, it is not necessary that all the subscribing witnesses should prove the execution, nor that proof should be made by those who subscribed as witnesses, nor that the will should be subscribed by the witnesses. *Hight v. Wilson*, 1 Dallas, 94. *Rossetter v. Simmons & ux*, 6 Serg. & Rawle, 452. Where special instructions for drawing a will are proved by two witnesses, and a will is drawn conformably thereto, in the testator's life-time; though he is prevented by extreme illness from executing the same, it is a good will in writing, under an ancient statute of that State. *Lessee of Walmley v. Read*, 1 Yeates, 87. See also *Arndt v. Arndt*, 1 Serg. & Rawle, 256.

Though a will of land must regularly be proved by two witnesses, yet in *Eyster & al. v. Young*, 3 Yeates, 511, it was held that circumstances may supply the want of one witness, where they go directly to the immediate act of disposition. Thus, where instructions were given by the decedent to A. in the presence of B. & C., and A. made short notes of them, which were drawn out

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the will.

In order, therefore, to prove a devise of lands according to the forms prescribed by the statute, it is necessary in the first place to produce the will itself, or to prove its former existence and destruction, or that it is withheld by the adversary, after notice to produce it, according to the ordinary course of proving a written document (y).

When the will has been lost, the probate of the will in the Spiritual Court is not admissible, even as secondary evidence of the contents (z), without proof *aliunde* that it is a true copy. For the Spiritual Court has no authority to authenticate a will of lands, and the seal of the Court does not prove it to be a true copy, except so far as relates to personal property (a); it must be proved by one at least of the attesting witnesses (b), if any be living, that the will was signed by the deviser, or by some one in his presence, and by his express directions.

* 1683 * It has been doubted whether it be sufficient that
Signature. the testator should seal the will (c). But according to the later authorities, mere sealing without writing is insufficient; for the evidence arising from hand-writing affords greater security and certainty than that arising from sealing (d).

(y) *Supra*, Vol. I. p. 328.

(z) 1 *Ld. Raym.* 731, 2; *Skinn.* 174; *supra*, Vol. I. p. 231. Neither is an exemplification under the great seal evidence of a will. *Comb.* 46.

(a) *B. N. P.* 246. But in an anonymous case (*Holt*, 298), where a defendant in replevin avowed for a rent-charge, but could not produce the will under which he claimed, and which belonged to the devisee in fee, the Ordinary's register of the will, and proof of former payments, were held to be sufficient evidence against the devisee.

(b) *Infra*, 1692.

(c) See *Lemayne v. Stanley*, 3 *Lev.* 1. By three of the Judges a sealing was held to be sufficient; so by Lord Raymond, at *Nisi Prius*, *Warneford v. Warneford*, 2 *Str.* 764. And see Lord Holt's dictum, *Lee v. Libb*, 1 *Show.* 69; and *Gryle v. Gryle*, 2 *Atk.* 176; *Bac. Ab. tit. Wills, D. 2.*

(d) Lord Hardwicke, in *Grayson v. Atkinson*, 2 *Ves.* 459, observ-

into form, and in part read to the decedent, who became insensible before the reading was finished—and the evidence of A. was confirmed in part by B. and in part by C.—it was ruled that the notes of instructions made by A. were sufficiently proved, *ibid.* But in *Hock v. Hock*, 6 *Serg. & Rawle*, 47, it was held that the execution of a will must be proved by two witnesses, each of whom must separately depose to all facts necessary to complete the chain of evidence; so that if one witness only were required, the will would be fully proved by the evidence of either.]

As evidence of the actual hand-writing of the party affords a more effectual remedy against fraud than the mere impression of a seal, the identity of which may be in itself doubtful (e), or which, if the identity be proved, may have been made by another without authority, it is impossible to suppose that the Legislature did not mean to require an actual signature.

It is sufficient if the testator sign his name at the beginning or side of a will, for the statute does not require him to *subscribe* it (g), as where he writes the will himself, beginning I, A. B. (h). But where * the will consisted of * 1684 several sheets, and the testator signed two of them, but from weakness could not sign the rest, the Court of King's Bench was of opinion that the will was incomplete (i) (1).

But where the will, which was written on three sides of a sheet of paper, concluded by stating that the testator had signed his name to the first two sides, and had put his hand and seal to the last, and in fact he had put his name and seal to the last, but had omitted to sign the other sides, it was held that the will was good, the signing the last sheet showed that the former intention had been abandoned (k).

It was held to be unnecessary, even when the testator was blind, that the will should be read over in the presence of the attesting witnesses (l). But it was then said, that stronger evidence would be required in the case of a blind

ed, "The statute, by requiring the will to be signed, undoubtedly required some evidence to arise from the hand-writing. Then how can it be said that putting a seal to it would be a sufficient signing? For any one may put a seal; no particular evidence arises from sealing. Common seals are alike; no certainty or guard arises from them." And see *Smith v. Evans*, 1 Wils. 313. *Ellis v. Smith*, 1 Ves. jun. 11; 17 Ves. 458; 18 Ves. 175.

In *Lemayne v. Stanley*, (3 Lev. 1), it was held that it was not necessary to write, for some cannot write, and their mark is then sufficient signing; others have their name on a stamp, and that is good enough.

(e) See *Grayson v. Atkinson*, 2 Ves. 459; 17 Ves. 458; 18 Ves. 175.

(g) *Hilton v. King*, 3 Lev. 86; 9 Ves. 248.

(h) *Lemayne v. Stanley*, 3 Lev. 1; 1 Freem. 538. *Hoil v. Clark*, 3 Mod. 218.

(i) *Right d. Cater v. Price*, Doug. 241.

(k) *Winsor v. Pratt*, 2 B. & B. 650.

(l) *Longchamp v. Fish*, 2 N. R. 415.

(1) [In *Pearson v. Wightman*, 1 Rep. Con. Ct. 345, it is said that where a will is written on several sheets of paper, it has never been determined that the testator must sign them all.]

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Attestation.

man than the mere attestation of signature, which stronger evidence had been supplied by the circumstances of that case (m) (2).

- * 1685 That it was attested and subscribed, &c.—Although proof be essential that the will was attested by the witnesses in the presence of the testator, it is not necessary that such attestation should be stated on the face of the will (n) (3).
The attestation of an illiterate * witness, by making his mark, is a sufficient subscription (o) (1).

And although the witness must attest and subscribe the will in the presence of the deviser, it is not necessary that they should do so in the presence of each other (p); neither

(m) The terms of the will had been dictated by the testator to Davis, (who was afterwards one of the attesting witnesses,) and was made in favour of a step-daughter, who lived with the testator, to the disinherison of his son. After the will had been written, it was read over, by the desire of the testator, in the presence of the step-daughter and several other persons present. A copy was made. And two months after, the testator made an alteration in it, and perfectly understood what he was doing.

(n) *Croft d. Dalby v. Pawlet*, Vin. Ab. tit. devise (N. 9); Bac. Ab. tit. Wills, D. 2. *Price v. Smith*, Willes 1; 4 Taunt. 217. And per *Ld. Eldon*, *Ranchiffe v. Parkyns*, 6 Dow. 202.

(o) *Harrison v. Harrison*, 8 Ves. jun. 185; *Addy v. Griz*, *Ibid.* 504.

(p) *Smith v. Codron*, cited 2 Ves. 455; *Grayson v. Atkinson*, 2 Ves. 454; *Jones v. Lake*, cited 2 Atk. 177. n. See *Stonehouse v.*

(2) [In *Shanks v. Christopher*, 3 Marsh. (Ken.) Rep. 144, it was held that although a testator be illiterate, it is not necessary that his will should be read to him, to render it valid; his acknowledgment of the signature is evidence that he is informed of the contents.

Where the execution of a will by a blind or illiterate man is proved by the legal number of witnesses, one witness is sufficient to rebut the imputation that a paper, of the contents of which he was ignorant, was imposed on him. *Lewis v. Lewis*, 6 Serg. & Rawle, 489.]

(3) [Nor is it necessary that the fact of his presence should be proved by the attesting witnesses, to the exclusion of other testimony. *Gwinn v. Radford*, 2 Littell's Rep. 137.]

(1) [Where one, who was named as executor, wrote the will, it was held that this was not attesting and subscribing the will as a witness, although it was contended that the scrivener, being named therein, necessarily wrote his own name in the course of writing the will, and that it was done in the testator's presence. *Snelgrove v. Snelgrove*, 4 Desauss. 274. So, a will executed in the presence of two subscribing witnesses is not sufficient, although the scrivener was present at the execution. *Dunlap v. Dunlap*, 4 Desauss. 305. And a codicil (written on the back of the will) which was executed in the presence of two subscribing witnesses, one of whom was different from the two witnesses of the will, does not give the will validity. *ibid.* See vide *Mooers v. White*, & al. 6 Johns. Ch. Rep. 375.]

is it necessary that the witnesses should see the devisor sign the will, provided he acknowledged his signature in their presence (q). Where the devisor, having executed his will in the presence of two witnesses, afterwards showed it to a third, and showed him his name, and told him it was his hand-writing, and desired him to witness it, which he did, it was held that the will was well executed (r) (2).

In the case of *Peate v. Ougly* (s), the testator wrote the will himself, and signed his name, and put a seal at the bottom, and added, in his own hand-writing, "signed, sealed and published as my last will and testament in the presence of ———." Two of the witnesses were dead, and the third swore, that about twenty-eight years before, being servant to the testator, he and the other witnesses were called up in the night, and ordered into the testator's chamber, who produced a paper folded up, and directed him and the others to set their hands to it as witnesses, which they did in his presence; but the witness did not see any of the writing, nor did the testator say it was his will, * or * 1686 what it was, but he believed this to be the paper, because he never witnessed any other paper for the testator; and added, that though the testator did not set his name or seal to the will in their presence, yet he had often seen him write, and believed the whole will and codicil to be of his hand-writing. Lord Chief Justice Trevor thought the evidence sufficient for the Jury to find the will well executed, and they found accordingly.

According to this case, it is not necessary either that the testator should acknowledge his signature in the presence of subscribing witnesses, or even that direct proof should be given that the testator's signature existed upon the will at the time of attestation, although in that case, the whole being in the hand-writing of the devisor, it was probable that the whole was written previous to the attes-

Evelyn, 3 P. Wms. 253; *Westbeeck v. Kennedy*, 1 Ves. & B. 362; *Ellis v. Smith*, 1 Ves. jun. 11.

(q) *Smith v. Codron*, cited 2 Ves. 455. *Stonehouse v. Evelyn*, 3 P. Wms. 253. *Grayson v. Atkinson*, 2 Ves. 454; Bac. Ab. tit. Wills, D. 2; 3 Mod. 218; 1 Show. 69. 88. [*Shanks v. Christopher*, 3 Marsh. 144.]

(r) *Ibid.*

(s) *Comyn's Rep.* 197.

(2) [The signing of a testator may be proved by his having acknowledged it, though the signature was not before him, and the paper lay at a distance. *Eelbeck v. Granberry*, 2 Hayw. 232. See *Burwell v. Corbin*, cited *Infra*, 1688, note (1).]

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tation. But it is to be observed, that where a testator having signed in the presence of two witnesses, and afterwards in the presence of a third, said this is my will, but did not put his seal, or acknowledge the hand-writing, Lord Hardwicke inclined to the opinion that the execution was imperfect. Yet in this case it was clear that the attestation of all the witnesses was subsequent to the signature by the devisor; whereas in the case of *Peate v. Ougly* it was possible that part might have been added after the attestation (z).

In the presence of the Testator.—It is not necessary that the testator should actually see the witnesses sign the will; it is sufficient to show that he was so * situated that he might have seen them do so. Where the testator desired the witnesses to go into another room, seven yards distant, to attest his will, and there was a window broken, through which he might see them, the attestation was held to be sufficient (u). So where the testator is sick, or in bed, with his curtain drawn (x). So where the testatrix could see the witnesses through the window of her carriage, and of the attorney's office (y) (1).

It is otherwise if the testator was so situated that he could not have seen the witnesses attest the will; as where they go down stairs into another room out of the testator's presence, and attest the will there (z).

Where the attesting witnesses retired from the room where the testator had signed, and subscribed their names in an adjoining room, and the jury found that from one part of the testator's room a person by inclining himself forward with his head out at the door, might have seen the

(t) See *Stonehouse v. Evelyn*, 3 P. Wms. 253; where the reporter says, that on mentioning the case of *Peate v. Ougly* to Mr. Justice Fortescue Aland, he said that it was sufficient if one of the three witnesses swore that the testator acknowledged the signature to be his hand; and hence Mr. Powell concludes it to be a necessary inference that such an acknowledgment at least is necessary to support the attestation. Powell on Devises, 80.

(u) *Shires v. Glascock*, 2 Salk. 688. See also the case of *Sir G. Sheers*, cited Carth. 81.

(x) Bac. Ab. tit. Wills, D. 1.

(y) *Casson v. Dade*, 1 Bro. Ch. R. 99; *Davy v. Smith*, 3 Salk. 395.

(z) *Broderick v. Broderick*, 1 P. Wms. 239.

(1) [What is to be considered an attestation of the will by the witnesses in the presence of the testator, see *Russell v. Moor Falls*. 3 Har. & M'Hen. 457.]

witnesses, but that the testator was not in such a situation in the room that he might by so inclining his head have seen them; it was held that the will was not duly attested (a). So if the testator was in a state of insensibility at the time (b).

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Where all the witnesses were dead, and the attestation stated that the will had been signed by the testator in the presence of the witnesses, without stating that they had subscribed the will in his presence, it * was held that it * 1688 might still be left to the Jury to presume that fact (c) (1).

Attestation.

It is of course essential that the formalities of the statute should apply to the same instrument. If different instruments be written on the same paper, and it appear to be the intention of the testator that all should constitute one instrument, the execution of the last will may be considered as an execution of the whole (d), even although the tes-

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(a) *Doe d. Wright v. Manifold*, 1 M. & S. 294. See further *Ecceleston v. Petty alias Speke*, Carth. 79; Comb. 156; 1 Show. 89; Holt, 222. *Machell v. Temple*, 2 Show. 288; *Longford v. Eyre*, 1 P. Wms. 740.

(b) *Right d. Cater v. Price*, Doug. 241.

(c) *Croft v. Pawlet*, 2 Str. 1109.

(d) *Carleton d. Griffin v. Griffin*, 1 Burr. 549.

(1) [Where one subscribing witness swore that he saw the testator sign, &c. and that he attested the will in his presence, and that the other witnesses were also present and subscribed their names in his presence, and in the presence of the testator, it was held to be sufficient evidence that the testator executed the will in the presence of all the witnesses. *Turnipseed v. Hawkins*, 1 M'Cord, 272.

Where all the witnesses to a will were dead, and one of them had signed the initials of his name, as a mark, and the testator had also signed his mark, and the hand-writing of two of the witnesses was proved, and a witness at the trial swore that he had seen the other witness make his mark, in the year 1760, to a paper in his possession, and that from a comparison of the two marks, and from the peculiar manner in which one of the initials was made, he believed the mark affixed to the will was made by the witness to it; this was held to be sufficient evidence of the execution of the will, to permit it to be read to the jury, when accompanied with evidence of a possession by the devisees, and of the declaration of one of the other witnesses, in his life-time, as to the due attestation by all the witnesses. *Jackson v. Van Dusen*, 5 Johns. 144.

Where a will devising real property was wholly written by another person, and signed by him with the name of the testator, and there were two subscribing witnesses, one of whom saw the signature and heard the testator acknowledge that it was done with his authority, and the other not testifying whether the paper was signed or not at the time of his attestation, the testator merely declaring "it is my will"—it was held that the paper was not sufficiently proved. *Burwell v. Corbin*, 1 Randolph. 131.]

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tator term the prior instrument a will, and the latter a codicil (e). And whether the subscription belonged to both instruments would be a question of fact for the Jury, under all the circumstances (f).

The testator wrote a will of lands, dated May 2, 1752, and signed it, but it was not sealed or attested, and afterwards wrote upon the same sheet of paper a *memorandum*, dated January 5, 1754, wherein, after disposing of some personalty, he added, "This is not to disannul any of the former part made by me 2d of May 1752, except," &c. and subscribed the latter memorandum, and published the whole in the presence of three witnesses, the Court held that this was a good attestation of the whole (g).

If the will be written at one time on separate pieces of paper, and signed by the testator, and all are produced at the time of execution, it is sufficient if the last sheet be attested by the witnesses (h); but if the last sheet only be attested, and none of the witnesses ever saw the first, it is insufficient (i); but it may be presumed from circumstances that the whole were * present. Where a testator made his will on two sheets of paper, and signed each, and also wrote a codicil on a single sheet, and showed the whole of the will and codicil to one witness, who attested both in his presence, and two other witnesses immediately afterwards came into the same room and attested the last sheet of the will and the codicil, but never saw the first sheet; and it was not on the table at the time, and both the sheets, and also the codicil, were found wrapped in the same paper, in the testator's bureau, after his death; the Court held that the Jury ought to have been directed to presume that the first sheet was in the room (k).

Publication.

Publication, &c.—The statute is silent as to any delivery, publication, or any other formal act by which the testator is to signify his adoption of the instrument. Hence it seems that the very act of signing the will, and causing it to be attested by witnesses, in the manner pointed out by the statute is sufficient.

Where the testator told the witnesses to take notice, and then signed the paper, and told them where to sign their names as witnesses, without saying what the instrument

(e) Powell's L. D.; Peake's L. E.

(f) See Lord Mansfield's observations, 1 Burr. 549.

(g) *Carleton d. Griffin v. Griffin*, 1 Burr. 549.

(h) *Bond v. Seawell*, 3 Burr. 1773. 1 Bl. R. 407.

(i) *Lea v. Libb*, 3 Mod. 262.

(k) *Bond v. Seawell*, 3 Burr. 1773. S. C. 1 Bl. Rep. 407.

was, Denison, J. held it to be a sufficient execution: And the same point was decided by Trevor, C. J. (l). So a delivery of a will as a deed has been held to be a sufficient publication (m), even where the testator represented it to the witnesses to be a deed, and the form of attestation was "sealed and delivered (n)" (2).

Credible witnesses.—It seems to have been held in general that an *incompetent* witness was not a *credible* witness. And in the case of *Pendock v. Mackender* (o), * it was decided that one who had been convicted of petit larceny was an incompetent witness to a will. And, in consequence, the stat. 31 G. 2, c. 35, was passed, which made a witness competent notwithstanding such conviction. Credible Witness. * 1690

In general, a devisee or legatee under a will was incompetent (p), although a mere executor or trustee who took no beneficial interest under a will was held to be competent (q) (1).

(l) In *Peate v. Ogley*, Comyns' Rep. 197.

(m) 8 Vin. Ab. 125; pl. 13.

(n) *Tyinner v. Jackson*, 4 Burn's Ecc. L. 117.

(o) 2 Wils. 18. [Willes, 665, S. O.]

(p) *Hilyard v. Jennings*, Carth. 514. *Holdfast d. Anstey v. Dowling*, 2 Str. 1253; Hardr. 331; 2 Salk. 691.

(q) *Bettison v. Bromley*, 12 East, 250, where the wife of an acting executor, taking no beneficial interest under the will, was held to be a competent witness to prove sanity. So in *Lowe v. Jolliffe*, 1 Bl. R. 365, an executor in trust, who had acted under the will, was permitted to prove the testator's sanity. In *Tyrrell v. Holt*, 1 Barnard. K. B. 12, a trustee was holden to be a good witness without releasing. See also *Goss v. Tracy*, 1 P. Wms. 287, where a grantee, taking no beneficial interest under the will, was held to be competent to prove the execution of the deed to himself. [See also *Phipps v. Pücher*, 2 Marsh. 20.]

(2) [In *Suett & al. v. Boardman*, 1 Mass. Rep. 258, it seems to have been supposed that a *publication*, of some sort, is necessary to give validity to a will. The court of Kentucky held that the writing, signing and attesting of a will, are of themselves sufficient publication. *Ray v. Walton*, 2 Marsh. 73. Lord C. J. Gibbs says, "a will, as such, requires no publication; be publication what it may, a will may be good without it—I do not know what the publication of a will is. I can only suppose it to be that, by which a person designates that he means to give effect to a paper as his will." 7 Taunt. 361. But a will is not valid, unless it appear that the testator knew, at the time of executing it, that it was his will." 1 Mass. Rep. *ubi sup.*]

(1) [An executor, who has accepted the trust, cannot, in Massachusetts, be used as a witness to support a will, although he be a mere trustee, having no devise nor legacy given him therein—he being a party, and liable eventually for costs. *Durant v. Starr* &

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ness.

But a doubt prevailed, whether the term credible related to the time of attestation, or to the time of proof.

In the case of *Holdfast* d. *Anstey v. Dowsing* (r), Lee, C. J. in delivering the judgment of the Court, observed, that the time for ascertaining the credibility of the witness was the time of attestation (2).

In the case of *Wyndham v. Chetwynd* (s), it was held, that an attestation by a witness who was interested at the time of attestation, but whose interest was discharged before his testimony was required to establish the will, was valid. And it was held, that payment, or a release, made an attesting witness *credible* within the meaning of the statute (t). The * same doctrine was afterwards maintained by three of the Judges of the Common Pleas against the opinion of Pratt, C. J. in the case of *Doe* d. *Hindson* v. *Kersey* (u) (1).

By the stat. 25 G. II. c. 6, sec. 1, it is enacted, that if any person shall attest the execution of any will or codicil, to whom any beneficial devise, legacy, &c. except charges on lands, &c. for payment of any debt, shall be given or made, such devise, legacy, &c. shall be void, and such person shall be admitted as a witness to prove the execution of such will or codicil.

By sec. 2, it is provided, that a creditor whose debt is

(r) 2 Str. 1253.

(s) 1 Burr. 417.

(t) Ibid.

(u) 4 Burn's Eccles. L. 88. Bac. Ab. tit. *Wills*, &c. (D) 3. *Infra*, 1692.

al. 11 Mass. Rep. 527. *Sears v. Dillingham & al.* 12 ib. 360. But as he is competent at the time of attestation and becomes incompetent only by accepting the trust, the will may be proved by the testimony of the two other witnesses. *Sears v. Dillingham & al.* ubi sup.

In Pennsylvania, an executor plaintiff, in a feigned issue to try the validity of a will, is not a competent witness, being liable for costs. *Vansant v. Boileau*, 1 Binney, 444.

In New Jersey and Connecticut, the English rule is adopted, that an executor is a competent witness to a will, unless he take an interest under it. *Denn v. Allen*, 1 Penn. Rep. 35. *Hawley v. Brown*, 1 Root, 494.

Vid. *Infra*, 1701, note (1). *Supra*, Vol. II. 775.]

(2) [The same doctrine is held in Massachusetts and Connecticut. *Amory v. Fellowes*, 5 Mass. Rep. 219. *Sears v. Dillingham & al.* 12 ib. 360—*Cornwell v. Isham*, 1 Day, 35. Swift's Ev. 65.]

(1) [See this opinion of Pratt, C. J. given at large, in a note to *Cornwell v. Isham*, 1 Day, 35.]

charged on lands shall, notwithstanding such charge, be a competent witness.

By sec. 3, a witness whose legacy has been paid or accepted, and released, or who shall have refused to accept such legacy on tender made (x), shall be admitted as a witness, &c.

By sec. 5, a legatee dying in the life-time of the testator, or before he shall have received, or released, or refused to receive his legacy, shall be a competent witness.

By sec. 6, it is provided, that the credit of every such witness shall be subject to the consideration of the Court and Jury, &c. as in all other cases (2).

But the statute does not extend to all interests created by a will. And it has lately been decided, that one who is interested at the time of the execution of the will, but who discharges that interest previous to the time of his examination, is not a good witness (y).

* One to whose wife the will gives an estate in fee after the determination of a life-estate, is not a good witness within the statute (o), although the wife dies after the

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(z) By sec. 4, such refusal shall bar his claim to such legacy; and after such acceptance the party shall retain the legacy, notwithstanding any defect in the will, &c.

(y) *Hatfield v. Thorp*, 5 B. & A. 589.

(o) *Hatfield v. Thorp*, 5 B. & A. 589. In *Doe d. Hindson v. Kersey*, 4 Burn's Ecc. L. 97, where lands were devised to trustees for the benefit of the poor, and two of the trustees who were attesting witnesses, before the day of trial conveyed the tenements to other persons, a majority of the Court were of opinion that the will was sufficiently attested; but Lord Camden differed from the rest.

(2) [This statute, by its own provisions, expressly extended to all the British colonies and plantations in America, in which the statute of frauds, &c. (29 Car. II.) was, by act of assembly or by usage, received as law; or in which the attestation and subscription of a witness or witnesses were made necessary to devises of lands, tenements or hereditaments. Under the different sections of this statute, or others substantially like it, are the following decisions:—A devise or legacy to a witness is absolutely void, so that a conveyance by the devisee to a third person is inoperative. *Jackson v. Denniston*, 4 Johns. 311. If either husband or wife be a witness to a will containing a devise or legacy to the other, such devise or legacy is void, and the party is a competent witness to the will. *Jackson v. Woods*, 1 Johns. Cas. 63. *Jackson v. Durland*, 2 Johns. Cas. 314. A witness to a will is competent to prove the execution of it, though his wife is a devisee of real estate in the will, if he and his wife join in a release of their interest under it. *Shaffer v. Corbett*, 3 Har. & M'Hen. 513. Though all the witnesses are legatees, yet neither is competent to prove the will, unless he releases. *Dickson v. Bates*, 2 Bay, 448. See also *Snelgrove v. Snelgrove*, 4 Desauss. 274.]

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death of the testator, before the determination of the life-estate, and the witness survives the wife (z).

Where an attesting witness would take the same interest, either under a former will to which he was not a witness, or under a latter will, he stands indifferent in point of interest, and is a good witness to prove the latter will (a) (1).

It is sufficient, in strictness of law, to call any one of the subscribing witnesses, who on production of the will can swear to the execution of the will by the testator, and the subscription by the witnesses, in his presence, to that will (b) (2). But whenever the will is disputed, all the attesting witnesses ought to be called; and upon an issue out of Chancery, that Court requires that they shall all be called (c) (3).

Although an attesting witness swear against his own attestation, he may nevertheless be contradicted, and the * 1693 will may be established by means of other * testimo-

(z) 5 B. & A. 589.

(a) Lord *Ailesbury's* case, cited 1 Burr. 427.

(b) *Longford v. Eyre*, 1 P. Wms. 741; B. N. P. 264. *Loose v. Jolliffe*, 1 Bl. Rep. 365. *Goodtill d. Alexander v. Clayton*, 4 Burr. 2224. [*Lindsay v. McCormick*, 2 Marsh. (Ken.) Rep. 280. *Hight v. Wilson*, 1 Dallas, 94. *Turner v. Turner*, 1 Littell's Rep. 103. *Hewell v. House*, 2 Rep. Con. Ct. 80. *Trustees v. Blount*, 2 Taylor, 13. *Denn v. Allen*, 1 Penn. Rep. 35.]

(c) *Bootle v. Blundell*, 1 Cooper, C. R. 186. In a suit for establishing a will in the exchequer, proof of the attestation of one of the witnesses only, without proof that the others are dead or abroad, is insufficient. *Wood v. Stone*, 8 Price, 613.

(1) [So, a witness to a will, who holds a covenant of warranty from the testator, stands indifferent between the heir and devisee. *Thompson v. Shoeman*, 1 Bibb, 401.]

(2) [Where one of the witnesses to a will proved his own signature, and that of another subscribing witness who was dead, but had no recollection of seeing the will executed, or any fact in relation to it; it was held that this was not sufficient proof of the execution of the will, but that the third subscribing witness, who was living within the jurisdiction of the court, ought to be produced. *Jackson v. Le Grange*, 19 Johns. 386. In *Jackson v. Vandyke*, 1 Cox's Rep. 28, a will purporting to be attested by three witnesses, but proved by two only, who said nothing concerning the third, was ruled to be sufficiently proved to go to the jury. In *Fox v. Evans*, 3 Yeates, 506, it was held that on an issue to try the validity of a will, where two of three subscribing witnesses prove it, and no evidence is offered of the hand-writing of the third, who is out of the State, the declarations of such third witness, impeaching the sanity of the testator, cannot be received.]

(3) [See *Supra*, 1682, note (1). Vol. I. 334, note (1).]

ny(d) (1). And even if all the attesting witnesses should swear that the will was not duly executed, it would be competent to the devisee to establish the will by circumstantial evidence (e). Where a surviving witness charges deceased witnesses as accomplices in an attempt to establish a fraudulent will, evidence of the good characters of the deceased witnesses is admissible in answer (f). It has been seen that the dying declaration of a deceased witness is admissible in evidence to impeach a will (g).

If all the witnesses be dead, proof should be given of their hand-writing, and also of that of the testator, and from such evidence the jury may presume the due execution of the will; although it do not appear from the written form of attestation that the witnesses subscribed the will in the presence of the testator (h). Where one of the attesting witnesses is abroad, it seems to be sufficient, as in other instances of instrumentary proof, to give evidence of his hand-writing. And this seems to be allowed by the practice of Courts of Equity, as well as in Courts of Law (i) (2).

It seems that in analogy to the case of a deed, if it be shown that diligent inquiry has been made after an attest-

(d) *Low v. Jolliffe*, 1 Bl. R. 365; *Hudson's case*, Skinn. 79. *Pike v. Badmering*, cited 2 Stra. 1096. *Goodtitle v. Clayton*, 4 Burr. 2224. *Austin v. Blades*, B. N. P. 264.

(e) *Ibid*.

(f) 1 Camp. 210. *Doe d. Walker v. Stephenson*, 3 Esp. C. 284. 4 Esp. C. 50. *Supra*, tit. *Character*.

(g) *Supra*, 462. *Wright v. Littler*, 3 Burr. 1244; 1 Bl. Rep. 346.

(h) *Hands v. James*, Comyns's Rep. 531; *Crest v. Pawlet*, 2 Stra. 1109. *Price v. Smith*, Willes, 1. *Lord Rاندcliffe v. Parkins*, 6 Dow. 202. [See *Hopkins v. De Graffenreid*, 2 Bay, 187. *Sampson v. White*, 1 M'Cord, 74. *Engles & al. v. Brington*, 4 Yeates, 345. *Bowman v. Bartlett*, 3 Marsh. 90. *Collins v. Elliott*, 1 Har. & J. 1.]

(i) See *Powel v. Cleaver*, 2 Brown's C. C. 504. *Lord Carrington v. Payne*, 5 Ves. 411. *Grayson v. Atkinson*, 2 Ves. 460.

(1) [An attesting witness may be offered to disprove the sanity of the testator. *Hampton v. Garland*, 2 Hayw. 147.]

(2) [Where there were three subscribing witnesses to a will devising lands (in Pennsylvania, where two only are required) one of whom only appeared before the register and proved the will in the usual form, after which he died—another of whom was a devisee and party to the suit, and the third was dead and his hand-writing could not be proved; it was held that evidence might be given of the testator's hand-writing, which together with the oath of the witness before the register, was deemed sufficient proof of the execution of the will. *Miller & al. v. Carothers & al.* 6 Serg. & Rawle, 215.]

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ing witness, at the place where the deviser lived, and elsewhere, where it was likely that he might be * found, and that no intelligence of him can be obtained, and the other witnesses be dead, or have become interested subsequently to their attestation, evidence of the hand-writing of the latter will be receivable to support the will (k). As in the case of a deed, it seems that proof by witnesses is not necessary where a will is thirty years old. It has indeed been questioned whether the thirty years are to be reckoned from the execution of the will, or from the time of the decease of the deviser. But as the rule is founded upon the probability that after the lapse of thirty years the usual judiciary means of proof are unattainable, it should seem in principle that the time ought to be computed from the execution of the will (l) (1).

(k) *McKenire v. Fraser*, 9 Ves. 5. Note, that the will in that case was thirty years old, and the testator had been dead for twenty years; the hand-writing of two of the subscribing witnesses was proved, but no account could be given of the third. An objection being taken to the proof, the Master of the Rolls observed, that he could see no distinction in this respect between a will and a deed, except that a will having no operation till the death of the testator, wanted a kind of authentication which the other possessed; but he cited the case of *Cunliff v. Sefton*, 2 East, 183. *Supra*, Vol. I. p. 338. and held that the will had been sufficiently proved.

(l) See *Calthorpe v. Gough*, at the Rolls, 4 T. R. 707, n; where the will was not proved by witnesses, and it was said at the bar that it need not be proved by witnesses, being above thirty years old; and the case of *Muchery v. Newbold* was cited, where Sir Lloyd Kenyon, Master of the Rolls, decided that a will above thirty years old should be read without proof, although the testator had died very recently. But in the case of *Calthorpe v. Gough*, the plaintiff, who was heir at law, admitted the will.

(1) [An ancient will of land, which has accompanied the possession for thirty years or upwards, may be read in evidence without proof of its execution. *Shaller v. Brand*, 6 Binney, 435. In order that a will may be given in evidence as an ancient deed, there should have been a possession of thirty years in conformity to it since the testator's death; a lapse of thirty years, since the execution of it by the testator, is not sufficient. *Jackson v. Blanshan*, 3 Johns. 292. A will, executed nearly eighty years ago, was admitted in evidence as an ancient deed, although possession had not followed it; the land being in a wild and uncultivated state, and there being certificates of its execution, and of its being recorded, indorsed on it by persons whose hand-writing could be proved, and which would tend to show its existence at a remote period. *Jackson v. Larroway*, 3 Johns. Cas. 283. See Vol. I. 345, note (1).

In those States where the probate of a will is conclusive in an action at common law to try the title to the land devised, the will, however old, would probably not be received in evidence, unless it had been admitted to probate.]

In the late case of Lord *Randliffe v. Parkyns* (*n*), the Lord Chancellor observed, that "in a court of law a will thirty years old, if the possession has gone under it, proves itself, and sometimes without the possession, but always with the possession, if the signing is sufficiently * recorded (*n*). But if the signing is not sufficiently recorded, it would be a question whether the age proves its validity, and then possession under the will, and claiming and dealing with the property as if it had passed under the will, would be cogent evidence to prove the duly signing, though it should not be recorded."

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In the case of a will, as well as in that of any other instrument (*o*), evidence is admissible to apply its terms to the proper objects, as to show what is comprehended within the description of the estate devised. If the testator devise the estate purchased by *A.* or a farm in the occupation of *B.*, it is matter of extrinsic evidence to show what estate *A.* purchased, or what farm *B.* occupied (*p*). Such evidence, it has been seen, is admissible even when there is an ambiguity in the application, and although no object can be found which wholly corresponds with the description given in the will of the intended devisee, or of the estate devised (*q*).

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ambiguities.

In addition to the cases cited *Supra*, 1024, 5, that of *Goodtitle v. Southern* may be referred to, where, under a devise "of all my farm and lands, called Trogues Farm, now in the occupation of *A. B.*" it was held that two closes, part of Trogues Farm, but in the occupation of *L. M.* passed under the devise, and that evidence had been properly admitted of a notice from the * devisor to *L. M.* to show that he considered these closes as parcel of Trogues Farm (*r*).

* 1696

(*m*) 6 Dow. 202.

(*n*) In that case the attestation stated that the testator signed in the presence of the witnesses, but did not state that they signed in his presence.

(*o*) *Supra*. *Parol Evidence*. Lord *Cheyney's* case, 5 Rep. 68. *Steede v. Berrier*, 1 Freem. 292; 1 P. Wms. 674; 2 P. Wms. 137. 142; 1 Ves. 231; 1 Atk. 411; 2 Ves. 216; Amb. 175; 3 Ves. 148.

(*p*) 1 Merivale, 653.

(*q*) *Supra*, 1024, 5. [1013, note (1), 1027, note (1).]

(*r*) *Goodtitle d. Radford v. Southern*, 1 M. & S. 299. So where the testator bequeathed his stock in a particular fund, and it appeared that he had not, when he made his will, any stock in that fund, having lately sold out and purchased into another fund, evidence was admitted to explain the mistake, and the legacy was satisfied out of the new fund. *Selwood v. Mildmay*, 3 Ves. 306.

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But the ground of admitting the extrinsic evidence in such cases is, that otherwise the will would have no operation whatsoever; where, on the other hand, the testator leaves property corresponding with the description in the will, evidence is never admissible to show that he intended other property to pass (s).

But ambiguities, it has been seen (t), which arise upon the face of the will, cannot be removed by the aid of extrinsic evidence; they may be helped by construction, but never by averment. An apparent uncertainty may be removed by a comparison of the different parts of the will, and thus what is uncertain as to the meaning of the testator in one part, may be explained and elucidated by the intention which he has clearly expressed in another. But if these means be insufficient, and, notwithstanding their application, uncertainty still remains, the will is void; were it otherwise, it would enable witnesses to make wills for testators (u).

In some instances, nevertheless, where the terms of a will of personal property have been doubtful, extrinsic evidence of the situation and circumstances has been admitted for the purpose of aiding the construction. * The principal authority for this is the case of *Fonnereau v. Poyntz* (x), where the testatrix having bequeathed to Mary Poyntz the sum of 500*l.* in Long Annuities, and other sums to other legatees by the same description to the amount of 1,300*l.*, *Ld. Thurlow* admitted evidence that the testatrix had only 120*l. per annum* Long Annuities, in order to explain whether the testatrix meant to give legacies to the amount of 1,300*l. per annum*, or only a gross sum of 1,300*l.* And he admitted the evidence on the ground, that upon the face of the will itself it was doubtful whether she meant the annual sum, or the gross sum, and that the state of her fortune showed that she must have meant the latter. In the case of *Masters v. Masters* (y), already referred to, where a bequest was made "to all and every the hospitals," evidence was admitted that the testator resided in Canterbury, in order to show his intention to apply his bequest

(s) *Supra*, 1026, 7. *Doe d. Tyrrell v. Layford*, 4 M. & S. 550. *Doe d. Brown v. Brown*, 11 East, 441. *Tytler v. Dalrymple*, 2 Meriv. 419.

(t) 1000.

(u) By the Lord Chancellor, in *Baylis v. The Attorney General*, 3 Atk. 239. *Vide supra*, 1014. and *Castledon v. Turner*, 3 Atk. 257.

(x) 1 Bro. C. C. 472.

(y) 1 P. Wms. 421. *Supra*, p. 1013. note (q).

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to the hospitals in *Canterbury*. If a man grant an estate for life, without expressing whether for his own life or for that of the grantee; if the grantor had an estate in fee, the grantee will take an estate for his own life; but if the grantor had but an estate for life or in tail, then the grantee will take an estate for the life of the grantor only (z). Although this has been relied on as an authority for the position, that the construction of a will may be aided by extrinsic evidence of the estate which the testator or deviser had when he made the will (a), yet it seems scarcely to warrant it; for there the evidence is given, not for the purpose of putting one construction rather than another upon the deed itself, but in order to apply that which is the true and certain *construction of law, according to the nature of the subject-matter and the necessity of the case. As the words of the grantor are to be taken most strongly against himself, a grant of an estate for life is construed by the law to mean for the life of the grantee, as being more beneficial to himself than one for the life of another man; here is no uncertainty until that construction is applied to the estate itself; and then, although it turn out that the estate of the grantor was not sufficient to enable him to grant for the life of the grantee, yet still the law applies the grant so far as the subject-matter admits, and gives an estate for the life of the grantor. The case of *Selwood v. Mildmay* (b), which has been cited for the same purpose, is also open to similar remarks. It was there held, that if a testator bequeath so much money in a particular stock, it is a specific legacy if the testator has so much money in that stock; but that it will not be a specific legacy if the testator has no money in that stock. Here the extrinsic evidence to show what estate the testator had is not admitted for the purpose of giving a preference to one particular construction of a will doubtful in its terms; the language and meaning of the terms of the will are clear; the doubt arises upon their application only; and then, as the subject-matter does not admit of the application which the law would have made, had such specific stock existed, the law still applies the intention so manifested, as far as circumstances will permit.

It is difficult to consider the admission of any extrinsic

(z) *Shep. Touchstone*, 88; 2 B. & B. 551; *Phillipps on Ev.* vol. I. 474.

(a) *Phillipps on Ev.* vol. I. 474. 3d. ed.

(b) 3 Ves, 410,

* 1698

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* 1699

evidence for the purpose of construing a will, and thus showing the testator's real intention, in any other light than as a violation of the general rule. The great principle is, that a testator's meaning shall be expounded through the medium of the terms which * he has used, as explained by the aid of legal construction. Where the rules of legal construction fail to extract any meaning, or where they equally warrant a number of different meanings, to admit parol evidence to show what the testator really meant, is to substitute all the doubt and uncertainty which attends parol, for the certainty of written, evidence. If evidence of his situation and circumstances be admissible for the purpose of giving the true construction to a doubtful instrument, that is, for the purpose of showing what the real intention of a testator was where his expressions are doubtful, why are not his parol declarations also admissible for a particular purpose? Evidence of his situation and circumstances are not admissible but for the purpose of collecting the real intention of the party, and are but one mode of inferring that intention, in many instances less desirable than direct oral expressions of it. Why should one extrinsic light for exploring a doubtful meaning be admitted, and yet another be excluded? Again; if the doctrine be admitted in the case of a bequest of personal, why should it be rejected in the case of a devise of real, property? As the object in each case is the ascertainment of the real situation of the testator, it is in principle difficult to conceive that there should be any diversity as to the means (c).

(c) In the late case of *Smith v. Doe* d. *Lord Jersey*, 2 B. & B. 473, the admissibility of extrinsic evidence for the purpose of construing the terms of a power to grant leases, was incidentally much discussed; and the opinions of the learned Judges, which were delivered *seriatim*, differed much upon that point. A settlement-deed contained a power to grant leases, &c., so as there were contained in every such lease a power of re-entry for non-payment of the rent thereby reserved. A lease executed by virtue of this power contained a proviso for re-entry if the rent of 2l. &c. should remain unpaid for fifteen days after it became due, and no sufficient distress could or might be taken on the premises. Upon the trial of an ejectment against the lessee, evidence was admitted that the usual and accustomed form of leases of the estate, as well prior as subsequent to the settlement contained a conditional power of re-entry similar to that contained in the lease in question. The original power referred to the accustomed rents, services, &c. Judgment was given for the defendant in the Court of King's Bench, but reversed, on error, in the Exchequer Chamber, and the latter judgment again was reversed in the House of Lords. The Lord Chancellor, Lord Redesdale, Abbott, C. J., Richards, C. B., Graham and Wood, Barons, and Best, J. were of opinion that the ex-

* The competency of an attesting witness to the will has already been considered (d). Although one who * takes a beneficial interest under a will is not competent to establish it by his testimony, yet executors and trustees who take no beneficial interest are competent witnesses (e) (1).

pressions contained in the power were to be considered as merely general, and that they were to be executed with reasonable qualifications, according to the practice of courts of equity and of conveyancers. And the Lord Chancellor, Lord Redesdale, and Richards, C. B. held, that, inasmuch as the instrument which gave the power referred to the former leases, the power was to be construed by the aid of such former leases which explained what was meant by the proviso for re-entry. But Dallas, C. J., Park, Holroyd, Burrough, and Richardson, Judges, were of opinion that the terms of the power were express and unambiguous, and required an absolute and immediate right of re-entry on non-payment of rent, and consequently that no constructive aid could be derived from extrinsic evidence. Bayley, J. was of opinion that the terms of the power were ambiguous, and that therefore the extrinsic evidence was properly admissible to show what the intention of the settler really was.

Notwithstanding the case of *Cooke v. Booth*, Cowp. 819; *supra*, 1032, note (p), it seems to be now settled that the terms of a deed cannot be construed or interpreted by the acts of the parties. In the case of *Iggulden v. May* (7 East, 237), the Court of K. B. held that a covenant in an indenture of lease to grant a new lease with all covenants, grants and articles, as in the said indenture contained, did not bind the lessor to insert a covenant of renewal in the renewed lease, and that the fact, that other leases containing such renewals had been made by the owners of the inheritance, could not be called in aid to construe the meaning of the indenture. The judgment of the Court was afterwards affirmed in the Exchequer; and in giving judgment, Mansfield, C. J. observed upon the case of *Cooke v. Booth*, "We think that was the first time that the acts of the parties to a deed were ever made use of in a court of law to assist the construction of that deed. Suppose the original lessor to have declared in the presence of fifty witnesses, that he intended to bind himself by that deed to a perpetual renewal, his declaration could not have been allowed to alter the construction of the deed itself. If so, why should the subsequent renewals, which are not evidence either so strong or so unequivocal as the declaration of the lessor, be allowed to alter the construction." And see *Baynham v. Guy's Hospital*, 3 Ves. jun. 298; *Tritton v. Foote*, 2 Bro. C. C. 636; *Eaton v. Lyon*, 3 Ves. 694.

(d) *Supra*, 1689.

(e) *Supra*, 786. 1690.

(1) [Where a testator devised his estate to a society incorporated for pious and charitable purposes, the members of the society (being mere trustees to convey the testator's bounty to the objects of the institution) were held to be competent witnesses to prove the sanity of the testator when he made his will. *Nason v. Thatcher* &

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Competency.

If the obligee devise a debt to the obligor, and the executor, in satisfaction of the legacy, delivers up the bond to the obligor, he is a competent witness to prove the sanity of the testator; for the obligation being cancelled, he cannot be charged at law (*f*). But it is otherwise in the case of a mortgage; for though the mortgage be cancelled, the right being transferred does not re-vest upon cancelling the deed (*g*).

Fraud.

Prima facie evidence of a will may be rebutted by proof of fraud (*2*); as that the supposed will is a mere fabrica-

(*f*) Gil. Ev. by Lofft, 230.

(*g*) Ibid.

al. 7 Mass. Rep. 398. So where A. devised an estate to the inhabitants of the first society in Colchester (Con.) for the purpose of supporting a school in the society, and the attesting witnesses were inhabitants of said society—it was held that the will was duly executed: For the inhabitants of the society took no beneficial interest, but were mere trustees to apply the estate to the education of children. *Cornwell v. Isham*, 1 Day, 35. Swift's Ev. 58. And in New Hampshire, where the testator bequeathed to a town five thousand dollars for the support of a congregational clergyman, and also devised to the town a large estate for the support of schools (*which the town was by law obliged to support*) and the attesting witnesses were inhabitants of the town and members of the congregational society, and annually taxed for the support of schools; it was held that the witnesses were "credible," and the will was established by their testimony. *Eustis v. Parker*, 1 N. Hamp. Rep. 273. This decision was not made on the ground that the inhabitants of the town were mere trustees of the property devised—but that by the usage of N. Hampshire, the members of public corporations are competent witnesses in all questions in which such corporations are interested. See Vol. II. 781, note (1).]

(2) [On the trial of an issue, to ascertain the validity of a will impeached on the ground of imbecility in the testator and fraud and imposition in the principal devisee, after evidence given that the testator was under the control of that devisee, and that the cause of his displeasure against a son, whom he almost disinherited, was the supposed extravagance of the son's wife, and that the principal devisee had made representations to that effect to the deviser; it was held that evidence of the general good character and conduct of the wife was admissible. *Dietrick v. Dietrick*, 5 Serg. & Rawle, 207. In such a case, the court should lean in favour of admitting evidence to enable the jury to judge, from a consideration of all the circumstances, whether the testator was controlled by improper influence. The evidence of practice on the intellect of a weak man is usually compounded of ingredients so various in their nature, and remote in their consequences and connexion, that the question of relevancy is often of very difficult solution. Per Gibson, J. 6 Serg. & Rawle, 56, *Patterson v. Patterson*. In that case, in connexion with evidence of a conspiracy between the testator's father and mother, and of fraud and imposition on his wife.

tion, or that it was obtained by fraud, as by the substitution of a false instrument for the one which the party really intended to execute (*h*); or that it was obtained by duress, or by proof of the incompetency of the party to make a will by reason of coverture (*i*), * or infancy (*k*), * 1702 or by proof of the want of sound memory and understanding.

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Fraud.

Capacity.

In the first place, the law presumes every one to be sane till the contrary appear; the burthen, therefore, of proof is cast upon those who impeach the understanding of a testator (*l*), by evidence applicable to the time of the

(*h*) *Doc v. Allen*, 8 T. R. 147.

(*i*) See the stat. 34 & 35 H. 8. c. 5. s. 14. But a feme covert may dispose of property by will which she holds in *auter droit* as executrix (*Scammell v. Wilkinson*, 2 East, 552), or under a power contained in the marriage settlement. *Driver v. Thomson*, 4 Taunt. 294. And courts of equity have gone so far as to say, that a married woman who has a separate estate may make a will without a power. Per Mansfield, C. J. 4 Taunt. 297. [See *Osgood v. Breed*, 12 Mass. Rep. 525.]

(*k*) See the stat. 34 & 35 H. 8. c. 5, s. 14.

(*l*) *White v. Wilson*, 13 Ves. jun. 89; 6 Cruise, 15. But in the case of *Wallis v. Hodgson* (Chitty's R. 300), it was said that it is incumbent on a devisee who sets up a will to prove not only the

evidence was admitted that the estate came by the wife, that it was valuable, and that she had been practised upon to induce her to consent that it should be converted from real into personal property.—The testator having given her only "her gold watch, with all her wearing apparel, her saddle and bridle, with her spinning wheel and reel," it was held that the evidence admitted, taken in connexion with the other matters, might have a powerful and proper influence on the event of the cause. In *Iddings & al. v. Iddings*, 7 Serg. & Rawle, 115, Tilghman, C. J. says, that in such cases, "it is very proper that the jury should be informed of all circumstances attending the drawing and execution of the will. Who were present, what the testator said, whether any person interfered, or prompted him in giving the instructions—all these and other circumstances might be material." Accordingly it was held, in that case, that the scrivener, who stated that the testator furnished him with the matter of the will, might be asked on cross-examination what the instructions were—solely however with a view to the state of the testator's intellect, &c. for if he was sound and free from undue influence, the will must stand as it was written, without regard to the instructions. In *Irish v. Smith*, 8 Serg. & Rawle, 573, it was held that where in such case an earlier will is attempted to be established, a cancelled will, in the testator's handwriting, and found among his papers, made at an antecedent period, when his understanding was unquestionable, and he was not assailed by intrigue, may be given in evidence, to show what were then his intentions as to the disposition of his property. *Vid. Infra*, 1715, note (2). *Supra*, 1684, note (2).]

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transaction sought to be affected (1). On the other hand, it is to be presumed that a man's mind remains unchanged till the contrary appear; when, therefore, lunacy has been once established, it is incumbent on him who alleges the validity of the act to prove that it was done at a lucid interval, during which the party was sane and competent (m) (1).

formal requisites under the Statute of Frauds, but he must also show the deviser to have been of a sound and disposing mind. That is, it seems, where the sanity of the testator is the question in dispute; in others, the will itself, where its provisions are sensible and reasonable, would afford ample *prima facie* evidence to throw the burthen of proof upon the heir. *Adseverationi tuæ cum competent fuisse neganti fidem adesse probari convenit.* L. 5, Cod. de Codicill. On the other hand, insanity apparent on the face of the will threw the burthen of proof on the testamentary heir. L. 27. ff. de Condit.

(m) The maxim is, *semel furibundus semper furibundus presumitur.* It is not enough to show that the act was *actus sapienti conveniens*, for that may happen many ways; but it must be proved to be *actus sapientis*, and to proceed from judgment and deliberation, or else the presumption continues. Lord Nottingham's MS. Co. Litt. by Butler, note 185.

Lord Thurlow, in the *Attorney General v. Parnter* (3 Bro. C. C. 443), observed, "If, however, derangement be alleged, it is clearly incumbent on the party alleging it to prove the same; but if the derangement be proved, or be admitted to have at any time existed, and a lucid interval be alleged to have taken place, the burthen of proof attaches to the party alleging such lucid interval, who must show sanity and competency at the particular period when the act was done to which the lucid interval refers. And it certainly is of equal importance, when any derangement at any period has been established, that the evidence in support of a lucid interval should be as strong and demonstrative as where the object of proof is to establish derangement itself."

In Swinburn, 78, it is observed, "So every man is presumed to have the right use of his reason until the contrary be proved; which being proved, then he is presumed to continue still void of it unless he were so for a short time, and in some particular actions only, and not continually for a long space, as for a month or more, or unless he fell into some phrenzy upon some accidental cause, which is afterwards removed, or unless it be a long time since he was assailed by the malady, for in all these cases he is not presumed to continue in his former furor or malady."

(1) [*Kinlock v. Palmer*, 1 Rep. Con. Ct. 225. *Jackson v. Van Dusen*, 5 Johns. 144. *Lessee of Hoge v. Fisher & al.* 1 Peters' Rep. 163. *acc.* If a person, who has been placed under guardianship as *non compos mentis*, be restored to his reason, he is capable of making a will, though the letters of guardianship remain unrevoked. *Stone v. Damon & al.* 12 Mass. Rep. 488. Where the mental debility of a testator is the consequence of age, there is less presumption of sanity at the time of the execution of the will, than where the mental malady is ordinary lunacy. *Turner v. Turner*, 1 Littell's Rep. 102.]

* The authorities on the subject state, that no person who is *non compos* (*n*) can make a will; and the term comprehends not only idiots and lunatics, but all other persons who from natural imbecility, disease, old age, or any other such causes, are incapable of managing their own affairs (*o*). The words mean the same with the English words "of unsound mind (*p*)."¹ An old man become childish, or so forgetful as not to remember his own name, cannot make a will; neither can a drunkard, who by excessive intoxication is deprived of the use of his understanding and reason (*q*) (*1*). And according to Lord Coke (*r*), to make * a will valid it is not enough

Non compos,
who.

* 1704

(*n*) A *non compos* is excepted out of the stat. 32 Hen. 8. c. 1.

(*o*) *Ex parte Cranmer*, 12 Ves. jun. 445; *ex parte Gillam*, 2 Ves. jun. 587.

(*p*) See *ex parte Barnsley*, 3 Atk. 168; 1 Bl. Comm. 304. *Ridgeway v. Darwin*, 8 Ves. jun. 67.

(*q*) 6 Co. 23.

(*r*) *Marquis of Winchester's case*, 6 Co. 23, a. See also Swinburn, 77. Although a man be incapable of conducting his own affairs, he is still answerable for his criminal acts, if he possesses a mind capable of distinguishing right from wrong. In the late case of *The King v. Bellingham*, the prisoner, in his defence to a charge of having murdered Mr. Perceval, avowed that he was justified in what he had done, because his Majesty's government had refused to redress certain grievances of which he complained. Mansfield, C. J. in summing up to the Jury, observed, "In another part of the prisoner's defence, which was not however urged by himself, that at the time of the commission of the crime he was insane.—With respect to this the law is extremely clear. If a man were deprived of all power of reasoning, so as not to be able to distinguish whether it was right or wrong to commit the most wicked transaction, he could not certainly do an act against the law; such a man, so destitute of all power of judgment, could have no intention at all. In order to support this defence, however, it ought to be proved by the most distinct and unquestionable evidence, that the criminal was incapable of judging between right and wrong. It must in fact be proved beyond all doubt, that at the time he committed the atrocious act with which he stood charged, he did not consider that murder was a crime against the laws of God and nature. There is no other proof of insanity which will excuse murder or any other crime."

"There are various species of insanity. Some human beings are void of all power of reasoning from their birth; such cannot

(1) [Old age alone will not disqualify a person from making a will. *Van Alst v. Hunter*, 5 Johns. Ch. Rep. 158.]

Drunkenness, merely of itself, is no legal exception to the validity of a will, unless it absolutely disables the party from disposing of his estate with intelligence and reason. Per Yeates, J. *Starret v. Douglas*, 2 Yeates. 48.]

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for the testator to have had memory sufficient to answer familiar and usual questions, but he must have

be guilty of any crime. There is another species of madness, in which persons are subject to temporary paroxysms, in which they are guilty of acts of extravagance; this is called lunacy. If these persons were to commit a crime when they were not affected with the malady, they would be, to all intents and purposes, amenable to justice; so long as they could distinguish good from evil, so long would they be answerable for their conduct. There is a third species of insanity, in which the patient fancies the existence of injury, and seeks an opportunity of gratifying revenge by some hostile act. If such a person were capable, in other respects, of distinguishing right from wrong, there is no excuse for any act of atrocity which he may commit under this description of derangement. The witnesses who have been called to support this extraordinary defence have given a very singular account, in order to show that at the time of the commission of the crime the prisoner was insane. What may have been the state of his mind some time ago is perfectly immaterial; the single question is, whether, when he committed the offence charged upon him, he had sufficient understanding to distinguish good from evil, right from wrong, and that murder was a crime not only against the law of God, but against the laws of the country."

Thomas Bowler was tried at the Old Bailey, on the 2d of July 1812, for wilfully and maliciously discharging a blunderbuss loaded with bullets, at William Burrowes, and wounding him with the contents in the neck and back, under circumstances, as they were disclosed by the evidence, which manifested considerable ill-will towards the prosecutor, and design in the execution of his purpose. The defence set up was insanity occasioned by epilepsy.

Elizabeth Haden, the housekeeper of the prisoner, deposed, that he was seized with an epileptic fit on the 9th of July 1811, and was brought home apparently lifeless, since which time she had perceived a great alteration in his conduct and demeanor. He would frequently dine at nine o'clock in the morning, eat his meat almost raw, and lie on the grass exposed to rain; his spirits were so dejected, that it was necessary to watch him lest he should destroy himself.

Mr. Warburton, the keeper of a lunatic asylum, deposed, that it was characteristic of insanity, occasioned by epilepsy, for the patient to imbibe violent antipathies against particular individuals, even his dearest friends, and a desire of taking vengeance upon them, from causes wholly imaginary, which no persuasion could remove; and yet the patient might be rational and collected upon every other subject. He had no doubt of the insanity of the prisoner, and said he could not be deceived by assumed appearances.

A commission of lunacy was produced, dated the 17th of June 1812, and an inquisition taken upon it, whereby the prisoner was found insane, and to have been so from the 30th of March then last.

Mr Simon Le Blanc, before whom the trial took place, after summing up the evidence, concluded by observing to the Jury, that it was for them to determine whether the prisoner, when he committed the offence with which he stood charged, was or was not incapable of distinguishing right from wrong, or under the influence of any illusion in respect of the prosecutor, which rendered his

had a disposing mind, * so as to have been able to make a disposition of his estate with understanding and reason (1).

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mind at the moment insensible of the nature of the act he was about to commit; since in that case he would not be legally responsible for his conduct. On the other hand, provided they should be of opinion, that when he committed the offence he was capable of distinguishing right from wrong, and was not under the influence of such an illusion as disabled him from discerning that he was doing a wrong act, he would be amenable to the justice of his country, and guilty in the eye of the law.

The Jury, after considerable deliberation, pronounced the prisoner guilty.

So, according to the text writers, these defects, whether permanent or temporary, must be unequivocal and plain, not an idle frantic humour, or unaccountable mode of action, but an absolute dispossession of the free and natural agency of the human mind (1 Hale's P. C. c. 4). According to Lord Hale, the best criterion he could think of for distinguishing between total and partial insanity, was this: "If a person labouring under melancholy distempers hath yet as great understanding as ordinarily a child of fourteen years hath, such a person may be guilty of treason or felony." Hale's P. C. 30.

In *Arnold's* case, the prisoner was indicted for maliciously shooting at Lord Onslow. No doubt could exist of his being to a certain extent deranged, and that he had greatly misconceived the conduct of Lord Onslow. From the evidence, however, it appeared that he had formed a regular design, and prepared the proper means for carrying it into effect. It was stated by the Court to the Jury, that he could not be guilty if he did not know what he was doing; but that partial insanity would not excuse him, but he must have laboured under such a deprivation of reason as rendered him as senseless as a brute or an infant.

In the case of the *Earl of Ferrers* (State Trials), although it was proved that his lordship was occasionally insane, and incapable from his insanity of knowing what he did, or judging of the consequences of his actions, yet as it appeared, that when he committed the offence he had capacity sufficient to form a design, and know its consequences, he was found guilty and executed.

William White having paid his addresses to Maria Bally, a young schoolmistress, who subsequently forbade his visits, he shot her with a pistol, in the presence of her scholars. The fact being proved, three witnesses were brought forward to prove his insanity; but as

(1) [*Lessee of Hoge v. Fisher & al.* 1 Peters' Rep. 164, per Washington, J. acc. If a testator, at the time of dictating his will, have sufficient discretion for the purpose, and be able to recollect, at the time of executing it, the particulars he has dictated—this is evidence of a sound and disposing mind and memory. *Hathorn & al. v. King*, 8 Mass. Rep. 371. There is no standard by which a testator's understanding is to be weighed, but one—and that is—had he such a portion of understanding as would enable him to do any binding act? Per Duncan, J. 7 Serg. & Rawle, 95, *Rambler & al. v. Tryon & al.*]

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IV.

* 1707

Importunity.

Question of
fact.

* Swinburn observes (p. 72), that "the sane memory for making a will is not at all times when the party can * speak yea or no, and hath life in him, but he ought to have judgment to discern, and be of perfect memory, otherwise the will is void; and therefore the evidence ought to go to this extent."

According to the ecclesiastical law, importunity, in its legal acceptation, to avoid a will, must be such as the testator is too weak to resist, and in such a degree as to take away his free agency (s) (1).

The question of sanity is so peculiarly a question of fact for the decision of a Jury, that a will of a real estate cannot be set aside in equity, without being first tried at law on an issue of *devisavit vel non* (t).

The nature of the evidence requisite to prove the insanity of the testator on the one hand, or to establish his sanity on the other, is too obvious to require comment. Evidence for the first of these purposes consists principally

but as they merely deposed to dejection of spirits, manifested previous to the murder, he was found guilty and executed. Collinson on Lunacy, vol. 1, p. 474.

In *Hadfield's* case, 1800 (Ib. 480), the prisoner was tried for high treason, and the overt act laid was the firing at the King at Drury-lane Theatre; previous insanity was proved, manifested by acts which were continued nearly up to the time of the imputed offence, Lord Kenyon stated, that as the prisoner was deranged immediately before the offence was committed, it was improbable that he had recovered his senses in the interim; and although, were they to run into a nicety, proof might be demanded of his insanity at the precise moment when the act was committed, yet there being no reason for believing him to have been at that moment a reasonable and accountable being, he ought to be acquitted.

"A drunkard," saith Lord Coke, "who is *voluntarius demon*, hath no privilege thereby, but whatsoever hurt or ill he doth is aggravated by his drunkenness. *Nam omne crimen ebrietas et incendit et detegit.*" 1 Inst. 247.

(s) P. C. in *Kinleside v. Harrison*, 2 Phillimore, 551.

(t) *Bransby v. Kerridge*, 1 Eq. C. Ab. 406.

(1) [A man has a right, by fair argument or persuasion, to induce another to make a will, and even to make it in his favour. Therefore, on an issue to try the validity of a will, evidence is not admissible that one of the devisees "had by various discourses intimated that he had procured the will to be made, and that the same was read to him, and that he had given the reasons why his brothers and sisters had got so small a portion." *Miller & al. v. Miller*, 3 Serg. & Rawle, 267. See *Supra*, 1701, note (2). Swinburn, Part ii. sec. 5. Style, 427. Whenever a will is made by interrogatories, the court must be more upon its guard against importunity, and more strict in requiring proof of spontaneity and volition than it would be in ordinary cases. Per Sir John Nicholl, 1 Phillimore, 58.]

in the proof of such acts done, and declarations made by the party, as are inconsistent with sanity (u) (2).

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(u) Swinburn observes, that it is a hard and difficult point to prove a man not to have the use of his understanding or reason; and therefore it is not sufficient for a witness to depose that the testator was mad, or beside his wits, unless a sufficient reason can be given to prove this deposition, as that he saw him do such acts, or heard him speak such words, as a person having reason would not have done or spoken. Swinburn, 72.

(2) [The law has placed the subscribing witnesses about the testator to ascertain and judge of his capacity; *Heywood v. Hazard*, 1 Bay, 335. *Chase & al. v. Lincoln*, 3 Mass. Rep. 287; they therefore may testify as to the opinion they formed of the testator's mind at the time of executing the will. *Poole & al. v. Richardson*, 3 Mass. Rep. 330. Other witnesses may testify to the appearance of the testator, and to particular facts, from which the state of his mind may be inferred; but not as to their opinion or judgment merely of his sanity or insanity, without stating the facts from which they draw their conclusions. *ibid.* *Buckminster & al. v. Perry*, 4 Mass. Rep. 593. *Rambler & al. v. Tryon & al.*, 7 Serg. & Rawle, 92. An inference of infirmity of mind cannot be drawn from a conversation between the testator and a witness, without disclosing what that conversation was. *Irish v. Smith*, 8 Serg. & Rawle, 573. Physicians may be asked, whether from the circumstances of the testator, and the symptoms they observed, they can form an opinion of the soundness of his mind, and if so, what their conclusion is; but in either case, they must state the circumstances or symptoms from which they draw their conclusions. *Hathorn & al. v. King*, 8 Mass. Rep. 371. See also *Lessee of Hoge v. Fisher & al.*, 1 Peters' Rep. 164. Where witnesses have given their opinion of the understanding of the testator, founded on facts known to them, they cannot, in the cross-examination, be asked what their opinion would be on a different state of facts. *Rambler & al. v. Tryon & al.* *ubi sup.* Evidence may be given that in consequence of a paralytic stroke, some time before the execution of the will, the testator's intellect was much impaired, and continued so until the time of its execution, and afterwards. 8 Serg. & Rawle, and Peters' Rep. *ubi sup.* A witness may be asked whether he knew whether or not the eye-sight of the testator was good enough to have enabled him to recognize the witness, when near him, if his mind had been right. 8 Serg. & Rawle, *ubi sup.* And he may be permitted to testify that he "visited the testator; that he would look at him with a vacant stare; after speaking with him, and telling him who he was, he would answer; his countenance and appearance indicated childishness." *ibid.* Evidence that the testator's wife observed to a witness, in her husband's presence, "that he did not attend to business, that he was incapable," to which the husband said nothing, is admissible. *ibid.* The jury may infer incapacity to make a will from facts anterior to its execution; and when there is no evidence of infirmity of mind, at the time of the execution of the will, infirmity may be inferred from anterior and subsequent facts. *ib.*

Evidence of an opinion expressed by one of the devisees in a will, that the testator was not of sound mind is not admissible to prove insanity, &c. *Phelps & al. v. Hartwell*, 1 Mass. Rep. 71. *Aliter*, as to the declarations of one of the devisees, who is a party of record, respecting facts which occurred at the time of making the will. *Alkins*

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IV.Proof of
capacity.

* The widow of Mr. Bennett claimed the whole of her husband's property under his will. Bennett had been greatly debilitated in mind and body by habits of debauchery, and the woman effected the marriage by getting into lodgings opposite to him at Bath, and no sooner were they married than she discharged all his servants. Lord Thurlow was much against the will, and two issues were directed as to its validity, in both of which it was established. L. C. J. Eyre, before whom it was tried, stated to the Jury, that the point was *whether he knew perfectly well what he was doing*, and that they were not to enter too minutely into considerations of influence (x).

The heir at law is not estopped from impeaching a will on the grounds of the testator's insanity, although he has himself proved the will in the Ecclesiastical Court, and retained the legacies (y).

The manner in which a will has been written and executed, and the contents of the will itself, coupled with the situation of the testator, and the circumstances under which it was made, afford important evidence as to his capacity (z). And it seems, that from such evidence alone, where the terms of the supposed will are such as tend to exclude the supposition of the maker's sanity, the Jury may decide against the validity of a will (a) (1). But it is clear, on the other hand, that it is not sufficient to show that the dispositions of the will are imprudent and unaccountable (b).

(x) *Bennett's case*, cited 9 Ves. jun. 185. [See *Supra*, 1701, note (2). 1707, note (1).]

(y) *Lord Montague's case*, cited 9 Mod. 90.

(z) 9 Ves. jun. 610.

(a) *Burr v. Davall*, 8 Mod. 59.

(b) Sir T. Daval had two sons, and being taken ill on the 15th of April 1719, made his will, devising an estate of 1,600*l.* a year to his eldest son and the heirs of his body, and another of 1,700*l.* to his youngest, and the heirs of his body. If either of his sons should die *without* issue, the estate of him so dying was to go to the survivor; but if both of his sons should die *with* issue, the two estates

v. Sanger & al., 1 Pick. 192. See *Miller & al. v. Miller*, 3 Serg. & Rawle, 267. On the issue of *devisavit vel non*, the declarations of one of the devisees, who is not a party of record, are not evidence to invalidate a will. *Lightner v. Wike*, 4 Serg. & Rawle, 203. *Boward v. Wallace*, *ibid.* 499.]

(1) [To justify a jury in invalidating a will, from its intrinsic evidence only, would require an extreme case, perhaps such as can never occur; but the disposition of the property may be so utterly absurd or unjust, as to induce a reasonable belief that no man in his senses, and uncontrolled by an improper influence, would make it; and there may be cases, where the internal evidence, added to other proof, which would of itself leave the question doubtful, ought to turn the scale. Per Gibson, *J. Patterson v. Patterson*, 6 Serg. & Rawle, 56.]

* The capability of the testator to discharge the duties of a public situation affords a strong presumption of his capacity to make a will (b) (1).

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It has already been observed, that when confirmed insanity at any period of time antecedent to the making of the will has been established, it lies on the devisee to prove the competency of the testator (c) when he made the will.

Proof of lucid
interval.

Lord Thurlow (d) observed, that if the derangement be proved, or be admitted to have at any time existed, and a lucid interval be alleged to have taken place, the burthen of proof attaches to the party alleging such lucid interval, who must show sanity and competency at the particular period when the act was done to which the lucid interval refers. And it is certainly of equal importance, when derangement at any period has been established, that the evidence in support of a lucid interval should be as strong and demonstrative as where the object of proof is to establish derangement itself.

It is, however, to be recollected, that a lucid interval, from its very nature, does not admit of that full measure of proof which positive insanity affords by symptoms and indications of a decisive nature (e). * This doctrine, there- * 1710

were devised to Daniel Burr. The sons died without issue, and it appeared that a jointure of 600*l.* had been charged on the estate devised to the elder brother; but the verdict was in favour of the will.

(b) See *Greenwood's case*, cited 3 Bro. C. C. 444; 13 Ves. jun. 89. See also *White v. Wilson*, 13 Ves. 87.

(c) *Supra*, 1702, note (m).

(d) *Attorney General v. Parnther*, 3 Bro. C. C. 443.

(e) See the observations of Sir J. Nicholl, in giving judgment in the case of *White v. Driver*, 1 Phill. R. 88. He says, "It is scarcely possible indeed to be too strongly impressed with the great degree of caution necessary to be observed in examining the proof of a lucid interval; but the law recognizes acts done during such an interval as valid, and the law must not be defeated by any overstrained demands of the proof of the fact."

Lord Thurlow, in the case of the *Attorney General v. Parnther*, also observed, "There is an infinite, nay, an almost insurmountable, difficulty in laying down abstract propositions on a subject which depends on such a variety of circumstances as the establishment of lucid intervals. General rules are easily framed, but the

(1) [Entries made by a testator in a book are a circumstance in favour of the sanity of his mind; and the weight to which such evidence is entitled rests with the jury, and depends on their nature and what degree of intellect it required to make them. *Irish v. Smith*, 8 Serg. & Rawle, 581.]

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interval.

fore, cannot be extended farther than to require, that where insanity at an antecedent period has been satisfactorily established, its continuance shall be presumed until that presumption be satisfactorily rebutted.

The fact that the will itself is a sensible one, provided it can be completely proved that the party who made it framed it without assistance, affords a presumption that it was made during a lucid interval (*f*) (1). * But although

application of them creates considerable difficulty, where they are not sufficiently comprehensive to meet every circumstance which may enter into and materially affect each particular case. There can be no difficulty in asserting, that wherever the mind acts, it ought to act efficiently, and to be in possession of itself; but it is not easy to lay down with tolerable precision the rules by which the state of a person's mind can be tried."

He further observed, that "evidence applying to lucid intervals ought to go to the state and habit of the person, and not to the accidental interviews of any individuals, or to the degree of self-possession when performing particular acts; for it would be extremely dangerous from particular acts to draw a conclusion so general, as that a person who had confessedly before laboured under mental derangement was capable of doing that which should be binding upon himself and others, and from such acts to try the state of the mind in those cases in which the disorder is, as it is most frequently, *insanity quoad hoc*. At the same time, though partial insanity frequently prevails, yet it must always be watched with infinite care; it seems scarcely possible to extract from any particular case that which will apply to any other."

(*f*) Godolph. 25. Swinburn observes, "If a lunatic person, or one that is beside himself at times, but not continually, makes his testament, and it is not known whether the same were made while he was of sound mind and memory or not, then in case the testament be so conceived as thereby no argument of phrenzy or of folly can be gathered, it is to be presumed that the same was made during the time of his calm and clear intermission, and so the testament shall be adjudged good; yea, although it cannot be proved that the testator useth to have any clear and quiet intermissions at all; yet nevertheless, I suppose that if the testament be wisely and orderly framed, the same ought to be accepted for a lawful testament."

Sir W. Wynne, in the case of *Cartwright v. Cartwright* (1 Phill. R. 90), observes, "Unquestionably there must be complete and ab-

(1) [The circumstance that a will was wholly written by the testator himself, is *prima facie* evidence that he was in his senses and able to make a will at the time of writing it, so that the *onus probandi* to repel that presumption lies on those who would impugn it. In such a case, proof that the testator's intellect was greatly impaired by the use of opium and ardent spirits, and that in consequence thereof he was frequently incapable of business, is not sufficient to repel the presumption, without proof that such was his condition at the time when the will was executed. *Temple & al. v. Temple*, 1 Hen. & Mun. 476.]

the wisdom and prudence of a will, when fully established to be the work of the testator, afford a reasonable, nay, even a strong presumption of his sanity, the more especially where it is made under circumstances which required the judgment and foresight of a rational mind, and embraces numerous and complicated provisions, it is still but a natural presumption, which admits of absolute proof to the contrary (g).

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Lucid interval.

* But it seems that a slight indication of folly in the instrument itself would be sufficient to rebut such a presumption (h). * 1712

These however, it is to be recollected, are not presumptions of law, but, upon the trial which involves the capacity of a testator to make a will, are mere natural presumptions for the consideration of the Jury, under all the circumstances of the case.

It is by no means necessary to show that a testator who has once been deranged had, at the time of making the will, regained all the powers of mind which distinguished him before the malady; all that is essential is, that he should be restored to a disposing mind, capable of doing an act of thought and judgment (i).

If a testator be proved to have been *non compos* at the solute proof that the party who had so framed it did it without any assistance. If the fact be so, that he has done without assistance as rational an act as can be, what then is more to be proved? I do not know, unless it can be shown by any authority or law what the length of the lucid interval is to be, whether an hour, a day, or a month. I know no such law as that; all that is wanting is that it should be of sufficient length to do the rational act intended. I look upon it, that if you are able to establish the fact that the act done is perfectly proper, and that the party who is alleged to have done it was free from disorder at the time, that is completely sufficient."

(g) It must be agreed, that the wisdom of a testament is, without doubt, a very strong presumption of the sanity of the testator. It was upon the authority of this presumption that the senate of Rome formally confirmed a testament made by a person in a state of insanity; because there was nothing unreasonable in his disposition, they fairly presumed that it was made in a lucid interval, and they forgot the certain madness of the testator in contemplating the good sense of the testament. It was upon a similar colour that the emperor Leo the philosopher decided, in his 39th Novel, that the testament of an interdicted prodigal ought to be executed, provided it contained nothing unworthy of the character of a man of prudence. Pleading of D'Aguessau, 2 Ev. Pothier, 525.

(h) Godolph. 25.

(i) See Lord Eldon's observations, *ex parte Holyland*, 11 Ves. 11.

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IV.

Revocation.

time of making his will, it is absolutely void, although it be proved that he afterwards recovered his senses (k) (2).

Prima facie evidence of a will may in the next place be rebutted by proof of revocation. The Stat. of Frauds (29 Car. 2. c. 3, sec. 6), enacts, that no devise of lands, tenements or hereditaments, nor any clause thereof, shall be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing or obliterating the same by the testator himself, or in his presence, and by his directions and consent; but all devises and bequests of lands and tenements shall remain and continue in force until the same be burnt, cancelled, torn, or obliterated by the testator or his directions in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or

* 1713 * other writing of the devisor, signed in the presence of three or four witnesses declaring the same.

In the first place, then, a will may be revoked by *some other will or codicil in writing*.—A second will does not revoke the first, unless its execution be perfect as an original will, even although it contain a clause of express revocation; for as it does not appear to have been the intention of the testator to revoke the former will without making another disposition of his property, and as the latter branch of the antecedent cannot be carried into effect, the law considers the act to be a nullity (1); as where the

(k) 11 Mod. 157.

(2) [Nor is a commission of lunacy against a testator a revocation of a will made by him when of sound mind. *Hughes v. Hughes's Ex'or.* 2 Munf. 209.]

(1) [*Reid & uz. v. Borland*, 14 Mass. Rep. 208. *Laughton v. Atkins*, 1 Pick. 535. *acc.* A will which has been disallowed, and decreed to be null and void, though perfect in all its parts and accompanied with all the formalities prescribed by the statute, cannot operate as a revocation of a former will. 1 Pick. *ubi sup.* An instrument intended to be a will, but failing of its effect as such, on account of some imperfection in its structure or for want of due execution, cannot be set up for the purpose of revoking a former will, although it contains an express clause of revocation; because it cannot be known that the testator intended to revoke his will except for the purpose of substituting the other. But a second will, inconsistent with the first, if perfect in its form and execution, though incapable of operating as a will, on account of some incapacity in the party, for whose benefit it is made, to take under it, may be set up as a revocation of the first. Per Parker, C. J. *ibid.*

The execution of a third will is a revocation of two former wills,

second will is attested by three witnesses, but they do not sign their names in the testator's presence (l).

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The mere fact of making a second will does not operate as a revocation of the first will. If a man by a second will revoke a former will, yet if he keep the first will undestroyed, and then cancel the second, the first will is revived (m) (2). And where the Jury found that the testa-

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Second will.

(l) *Onions v. Tyrer*, 1 P. Wms. 343. *Eggleston v. Speke*, 1 Show. 89; Carth. 80. *Limbery v. Mason*, Com. Rep. 454. [See *Belden & al. v. Carter*, 4 Day, 66.]

(m) Per Lord Mansfield, in *Harwood v. Goodright*, Cowp. 91; *Goodright d. Glazier v. Glazier*, 4 Burr. 2512, cited by Buller, J. Doug. 40.

though the last be lost or mislaid—in which case parol evidence of its contents is admissible. *Legare v. Ash*, 1 Bay, 464.

In North Carolina, a writing, though informal to operate as a will of lands, may yet revoke a former will. *Clark v. Eborn*, 1 Car. Law Repos. 91.

In Pennsylvania, since the statute of 1705, the revocation of a will of lands cannot be by parol, but is subject to the same solemnities as a will of personal property. *Boudinot & al. v. Bradford*, 2 Yeates, 170. *Lawson v. Morrison*, 2 Dallas, 289. But a will of lands may be revoked by a parol re-publication of a former will. *Havard v. Davis*, 2 Binney, 406. Where there is a will of a later date, and evidence is given of a parol re-publication of a will of an earlier date, parol proof may be given of the contents of the earlier will, in order to ascertain whether the two wills are different, if the will itself cannot be found. *ibid.* See *Supra*, 1682, note (1). *Arndt v. Arndt*, 1 Serg. & Rawle, 256.]

(2) [In Connecticut, it has been decided that where a second will expressly revokes a former, the destruction of the second does not set up the first, though the first remains uncanceled at the testator's death. *James v. Marvin & al.* 3 Conn. Rep. 576. See also *Moore & Metcalf v. De la Torre v. Moore*, and *Moore v. Moore & Metcalf*, 1 Phillimore, 375, 406, where the proposition stated in the text was much discussed in the Prerogative Court of Canterbury, (1816) and afterwards in the High Court Appeals (1817) and not recognized by those tribunals as absolutely or even generally true or reasonable.

But in Pennsylvania, it is said that where a second will is destroyed, *without more*, the preceding will, not having been cancelled, is, generally speaking, *ipso facto* revived. *Lawson v. Morrison*, 2 Dallas, 289. *Boudinot & al. v. Bradford*, *ibid.* 268. In South Carolina, where a testator duly executes a will, which he permits to survive him, it will not be revoked by a subsequent will which he has cancelled. *Taylor v. Taylor*, 2 Nott & M'Cord, 482. In Kentucky, where a man made a will, duly executed, which expressly revoked a former will, and afterwards destroyed the second will, *with an intention to give effect to the first*, and died under these circumstances, it was held that the first will was re-established. *Langinfetter v. Langinfetter*, Hardin, 119.

Where a will was made in due legal form, and a codicil after-

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Revocation.

Other writing.

* 1714

Cancellation.

tor had made a second will *different* from the former, but added, "in what particulars is unknown to the said Jurors," it was held that there was in point of law no revocation of the former will (n).

Or other writing signed in the presence of three or four witnesses.—The terms of this clause import that the testator shall sign the writing in the *presence* of the witnesses; but they do not require, as in the case of a will, that the witnesses shall sign in the presence * of the testator (o). The latter words of the clause relate to the words *other writing*, and not to the word *will*; and therefore a will does not operate as a revocation, unless it be a complete will under the fifth section, subscribed by the witnesses in the testator's presence. On the other hand, a complete will operates as a revocation, although the testator does not sign it in the presence of the witnesses (p) (1).

Or by burning, cancelling, tearing, &c.—To prove a revocation of this nature it must appear that an act of cancellation was done with the intent to cancel the will. As far as concerns the act, which is the mere symbol of intention, it is unnecessary to show a complete destruction or obliteration (q). If a testator having made two parts of a will,

(n) *Harwood v. Goodright*, Cowp. 87, in K. B. in error, in affirmation of the judgment of the C. P. and afterwards in the House of Lords.

(o) 1 P. Wms. 345.

(p) *Hoil v. Clark*, 3 Mod. 218. *Ellis v. Smith*, Cor. Lord Hardwicke, Ibid. 220, in not. Leach's edit.; 4 Burn's Ecc. L. 199.

(q) *Winsor v. Pratt*, 2 B. & B. 650; *Doe d. Perkes v. Perkes*, 3 B. & A. 489; *Bibb v. Thomas*, 2 Bl. R. 1043.

wards subjoined, and then a second will, to which a postscript was annexed and signed "revoking all former wills"—and the second will was cancelled by the testator, by cutting his name from the body of it, but leaving the postscript with his name signed to it—and this paper was preserved by the testator, as also his first will, both of which were found after his decease—it was decided that the postscript to the second will was a substantive revocation of the first, and that the cancelling of the second will did not necessarily cancel the postscript also, so as to set up the first as the will of the testator. *Bates v. Holman*, 3 Hen. & Mun. 502.]

(1) [An indorsement on a will of real property in these words—"this will is invalid," subscribed by the testator, but without the attestation of witnesses, was held to be an express revocation of it. *Witter & ux. v. Mott & al.* 2 Conn. Rep. 67. (See *Bates v. Holman*, cited in the preceding note.) But an indorsement (without date) on a will, in these words—"this will is intended to be altered, and will be, if time is given," does not amount to a revocation. *Ray v. Walton*. 2 Marsh. (Ken.) Rep. 74.]

destroy one of them *animo revocandi*, it annuls both. So where a testator having frequently declared himself to be dissatisfied with a will, ordered a person to fetch it (being in bed near the fire), and when it was brought, gave it a rent and threw it into the fire, where it would have been burnt had not the person who fetched it taken it off, undiscovered by the testator (r) (2).

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No violence to the instrument will operate as a revocation, where the party was of unsound mind at the time of the act (s).

* The question of revocation may either be one of fact * 1715 or of law; but where it turns on the intention of the de- Intention. visor, it seems to be a question of fact for the Jury. In

(r) *Sir Ed. Seymour's case*, cited Com. Rep. 453. See *Titner v. Titner*, cited 3 Wils. 508.

(s) Where the will of a person who had become insane was found smeared and gnawed, and no evidence was given of the state of his mind when it was done, it was held in the Prerogative Court, that according to the general rule, the rationality or irrationality of the agent was to be judged of from the nature of the act; and therefore, under the circumstances, the party being of unsound mind at the time of such cancelling, the will was established. *Scruby v. Fordham*, 1 Addams's Rep. 74.

(2) [The mere act of cancelling a will is nothing, unless it be done *animo revocandi*, and evidence is admissible to show the testator's intention in cancelling a will. *Jackson v. Holloway*, 7 Johns. 394. *Boudinot & al. v. Bradford*, 2 Dallas, 266. S. C. 2 Yeates, 170. *Burns v. Burns*, 4 Serg. & Rawle, 297. *Lawson v. Morrison*, cited 2 Dallas, 267. n. *Bates v. Holman*, 3 Hen. & Mun. 502. See *Moore & Metcalf v. De la Torre v. Moore*, 1 Phillimore, 375. 406. The slightest "burning or tearing," &c. of a will, accompanied with satisfactory evidence *aliunde* of an intention to revoke, will operate as a revocation. *Johnson v. Brailsford*, 2 Nott & M'Cord, 272. A will is not revoked by the testator's directing a person, with whom it is deposited, to burn it, if he refuses so to do. *Giles v. Giles*, Cam. & Nor. 174. A devisee, who by force or fraud prevents a testator from cancelling his will, may be a trustee for those who would be entitled to the property in case of a revocation—but the will in such case is not revoked. *Gains v. Gains*, 2 Marsh. (Ken.) Rep. 190. The Supreme Court of Pennsylvania have decided that a will made many years before and believed by the testator to be destroyed, but detained by one of the devisees to prevent its being cancelled or altered, is thereby avoided. *Anon.* Wharton's Digest, 603, cites 1 Smith, 41. Whether tearing off a seal (which is not necessary to the validity of a will) will in any case be a revocation—*query.* *Avery & al. v. Pirley*, 4 Mass. Rep. 462.

The declarations of the testator, as to his intention to alter his will, and being prevailed upon not to do so, are not admissible evidence to show that the will was fraudulently prevented from being revoked, even supposing that such fraudulent prevention of a revocation would avoid a will, there being no act or attempt shown to revoke the will, which act or attempt was fraudulently prevented. *Smith v. Fenner*, 1 Gallison, 170.]

PART IV.	the case of <i>Titner v. Titner</i> , where there were interlineations in a will, the question of revocation was left to the Jury (t); yet in the late case of <i>Winsor v. Pratt</i> (u), where the testator, after the execution of his will, made interlineations and obliterations, and afterwards made a fair copy, which was never signed, published or attested, and both the interlined will and the copy were found locked up in a drawer at his residence, the Court seem to have decided upon the fact of intention, and upon a special case being reserved, held that the will had not been revoked (x) (1).
Intention.	
Declarations of the testator.	

Declarations by the testator which are cotemporary with the act are not only admissible, but most important evidence to prove his intention, and the legal quality of the act (y) (2) If a will proved to have been executed, and which after execution remained in the custody of the testator, cannot be found after his death, a presumption (according to the practice of the ecclesiastical courts) arises

(t) By Wilmut, L. C. J. as cited by Gould, J. 3 Wils. 508.

(u) 2 B. & B. 650.

(x) *Winsor v. Pratt*, 2 B. & B. 650.

(y) *Burtenshaw v. Gilbert*, Cowp. 53.

(1) [If the deviser, without a republication of his will, make alterations and corrections in it, with the intent not to destroy but to enlarge and extend a devise already made, it is not a revocation of the devise. *Jackson v. Holloway*, 7 Johns. 394. An addition of words to a will by interlineation, in the testator's hand-writing, after it was executed, but at a time unknown, by which a bequest of personalty was enlarged, was held valid. *Pringle v. McPherson*, 2 Desauss. 524. An alteration of a pecuniary legacy in a will, by the legatee or a stranger, does not avoid the will as to other bequests. *Smith v. Fenner*, 1 Gallison, 170. See *Jackson v. Malin*, 15 Johns. 293.]

(2) [The declarations of the testator before and at the time of making a will, and afterwards, if so near as to be a part of the *res gesta*, are admissible to show fraud in obtaining the will: *Aliter*, of declarations at any distance of time after the will is executed, especially if the will was always in the testator's possession. *Smith v. Fenner*, 1 Gallison, 170. In North Carolina, evidence is admissible of the declarations of a testator made at any time subsequent to the execution of the will, tending to show that he believed the contents thereof to be different from what they really are; or declarations by the testator of any other circumstances, which show that it is not his will. *Reel v. Reel*, 1 Hawks, 248. See also *Rambler & al. v. Tryon & al.* 7 Serg. & Rawle, 90. In New York, declarations of the testator are not admissible to prove that he executed a will under duress. *Jackson v. Kniffen*, 2 Johns. 31. Where the capacity of a testator is denied, and fraud is charged, evidence is admissible of declarations by the testator of his intentions respecting his will. *Den v. Vanderve*, 2 Southard's Rep. 589.]

that he has cancelled the will, and the burthen of proving the contrary is thrown on the party alleging the contrary (z).

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IV.

In the next place it seems to be now established, that a will may not only be revoked by the means pointed out by the plain letter of the Statute of Frauds, but even by an implication arising out of collateral circumstances. Thus it has been held that the subsequent marriage of the testator, and the birth of a child, * afford a presumption * 1716 of revocation (a) of a will which would otherwise entirely exclude them (1).

Revocation by
implication of
law.

But upon the nature and grounds of this presumption a difference of opinion has existed. In the case of *Brady v. Cubitt* (b), Lord Mansfield, C. J. and Ashhurst and Buller, Js., were of opinion that such a presumption was a mere *præsumptio juris*, which might be rebutted even by parol evidence to the contrary; the doctrine being founded on a mere presumption of intention on the part of the testator to revoke his will under the circumstances (c). But Lord Kenyon, in the case of *Doe d. Lancashire v. Lancashire* (d), intimated an opinion that the foundation of the principle was not so much an intention to alter the will, implied from those circumstances happening afterwards, as a tacit condition annexed to the will itself, at the time of making it, that the party does not then intend that it should take effect if there should be a total change in the situation of his family. And his lordship observed, that if the decisions on the subject were referable to a subsequent intention, the principle would be considerably disturbed by the argument of Baron Perot, in *Christopher v. Christopher*; and the circumstance of a conception not communicated to the husband, or of a miscarriage subsequent to his death, the latter of which might have some influence on the intention of the devisor, and yet

(z) *Loxley v. Jackson*, 3 Phill. 128.

(a) *Brady v. Cubitt*, Doug. 30; *Speke's case*, Carth. 81; *Earl of Lincoln v. Rolls*, in Dom. P. 1695, 1 Eq. C. Ab. 412; *Tickner v. Tickner*, cited 3 Atk. 742; *Wellington v. Wellington*, 4 Burr. 2165; *Christopher v. Christopher*, 4 Burr. 2171. 2182.

(b) Doug. 30.

(c) Ibid. And see the cases of *Emerson v. Boville*, 1 Phill. R. 342; *Hollway v. Clarke*, Ibid. 339; *Johnston v. Johnston*, Ibid. 468.

(d) 5 T. R. 58.

(1) [See, on this subject, *Brush v. Wilkins*, 4 Johns. Ch. Rep. 506. *Coates v. Hughes*, 3 Binney, 498. *Wilcox v. Rootes & al.* 1 Wash. 140. *Yerby v. Yerby*, 3 Call, 334. *M'Cay v. M'Cay*, 1 Murphey, 447.]

PART
IV.Implied
revocation.

* 1717

would not operate as a revocation; and the former * would have that effect, though it could not influence his intention.

The doctrine of implied revocations, which is borrowed from the civil law, did not prevail after the express enactments contained in the Stat. of Frauds, without hesitation and reluctance; even in the case of *Christopher v. Christopher*, where the doctrine was finally sanctioned, a very able Judge dissented from it, lest the Statute of Frauds should be repealed (e).

The admissibility of parol evidence of the testator's declarations to rebut the presumption of revocation, although borrowed from the same source with the doctrine itself, seems to be still subject to great doubt, founded not only on the loose and uncertain nature of such evidence, but upon the very principles on which the presumption itself rests (f).

In the case of *Kennebel v. Scrafton* (g), the Court, upon the ground of preceding authorities, held that the marriage and subsequent birth of a child, without provision made for the objects of those relations, of themselves operated as a revocation of a will of lands, and that the rule applied in those cases only where there was an entire disposition of the *whole estate* to their exclusion and prejudice. And the Court left the question, how far the presumption of revocation might be rebutted by the parol declarations of the testator, untouched.

* 1718
On what lands
a will operates.

* As a will of lands can operate on such lands only as the deviser had when he executed the will, the operation of a will as to particular property may be defeated, by showing that it was purchased after the execution of the will (1), or that subsequently to the execution he levied a

(e) See the observations of Lord Ellenborough, 2 East, 538; and of Lord Kenyon, C. J. in *Doe d. Lancashire v. Lancashire*, 5 T. R. 49.

(f) See Lord Kenyon's observations, in *Doe d. Lancashire v. Lancashire*, 5 T. R. 49; and of Lord Alvanley, in *Gibbons v. Count*, 4 Ves. 848; and of the Lord Chancellor, in the case of *Kennebel v. Scrafton*, 5 Ves. jun. 664, in opposition to such evidence. On the other hand, the opinion of Eyre, C. J. in *Goodtitle v. Otway*, 2 H. B. 522; the case of *Lugg v. Lugg*, 1 Lord Raym. 441; of *Brady v. Cubitt*, Doug. 31.

(g) 2 East, 530.

(1) [*Hays & al. v. Jackson & al.* 6 Mass. Rep. 149. *Jiggitts v. Maney*, 1 Murphey, 258. *Johnson v. Hanly*, 1 Taylor, 305. *Cogdell's Executor v. Cogdell*, 3 Desauss. 346. *Means v. Evans*, 4 ib. 242. *Jackson v. Potter*. 9 Johns. 312. *Jackson v. Halloway*,

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IV.

On what lands
a will operates.

fine (h), or suffered a recovery (i) of lands which he had at the time of the execution of the will, for he thereby takes a new estate. And if a testator, having made his will, levy a fine to such uses as he shall by deed or will appoint, and die without making a new will, the will made prior to the fine is revoked (l) (2).

(h) *Parker v. Biscoe*, 3 Moore, 24. And see 1 Will. Saund. 277, note (4).

(i) Where a deviser, after he had made a will, suffered a recovery, in which, as well as in the deed to make a tenant to the *præcipe*, the tenant was called Edward, his real name being Edmund; in ejectment by the heir at law, it was held that the deviser and those who claimed under him were concluded by the estoppel, and that the will was thereby revoked. *Doe d. Lushington v. Bishop of Landaff*, 2 N. R. 491.

(l) *Doe d. Dilnot v. Dilnot*, 2 N. R. 401.

7 Johns. 394. acc. See also *Burke v. Lessee of Young*, 2 Serg. & Rawle, 389, *semb. acc.*

By a statute of Virginia, a devise of lands, which the deviser may acquire after the date of his will, is operative. *Turpin v. Turpin*, 1 Wash. 75.]

(2) [A man must be seized of the estate devised, at the time the devise is made, or it is inoperative and void. *Smithwick & al. v. Jordan*, 15 Mass. Rep. 115. *Smith v. Van Dursen*, 15 Johns. 343. But a deed of land obtained by fraud and imposition, though acknowledged and registered, does not effect such a disseisin of the grantor as to disable him from devising the land. 15 Mass. Rep. *ubi sup.* See *Brown & al. v. Wood & ux.* 17 Mass. Rep. 68. A devise to the disseizor will operate as a release by the devisor. *Poor & al. v. Robinson*, 10 Mass. Rep. 131.

To give effect to a devise, the deviser must not only be actually seized at the time he makes his will, but he must continue to be seized of it at the time of his death. *Minuse & al. v. Cox & al.* 5 Johns. Ch. Rep. 450.

An agreement by a testator, after the execution of his will, to sell land therein devised, is not a revocation *at law*. *Hall v. Bray*, 1 Cox's Rep. 212. But where an estate specifically devised is sold by the testator by an executory contract, it is a revocation of the devise *in equity*. *Walton v. Walton*, 7 Johns. Ch. Rep. 258. And though an estate devised is taken back again by the same conveyance, or otherwise, it is a revocation, even though the testator did not intend to revoke it. *Ibid.*

A deviser, after making his will, conveyed his share of the real estate under the will of his deceased father, and which formed part of the estate which he (the deviser) had devised to his children, to trustees to pay the debts of his father, and then in trust for the devisees of his father and their representatives: It was held that this was not a revocation of the will beyond the particular purpose for which it was intended, but that the trust as to the residue was for the devisees and not for the heirs of the devisor. *Livingston v. Livingston & al.* 3 Johns. Ch. Rep. 148.

In North Carolina, where a tract of land is devised, and the tes-

PART
IV.On what lands
a will operates.

If a testator bequeath a lease, and afterwards renews it, the new lease will not pass (m), unless from the will it can be collected that the testator intended that the legatee should take the lease then subsisting, or any which he should afterwards take (n).

Where a party having surrendered copyhold lands to the use of his will, afterwards surrenders the same lands to the use of his marriage settlement, the latter surrender does not revoke the former (o).

* 1719

* WINDOWS.

Case for ob-
structing
lights.

THE nature of the evidence to support an action for obstructing lights has already been adverted to (p). It is unnecessary either to allege or prove the message to be ancient (q), and twenty years' adverse possession affords presumptive evidence of a grant (r), but subject to explanation.

If one having land, build on it and sell the remainder, neither he nor one claiming under him can obstruct the lights in derogation of his grant (s). And upon the same principle, where several adjoining portions of land on which the building of houses had been commenced were sold, and by the conditions of sale the houses were to be finished according to a particular plan within the space of two years, it was held that a purchaser of one of the lots could not, by erecting an additional building at the back of his house, obstruct the light from the windows of

(m) *Coleby v. Manley*, 6 Madd. 84. And see *James v. Dean*, 15 Ves. 238; *Marwood v. Turner*, 3 P. Wms. 163.

(n) *Ibid.*

(o) *Vawser v. Jeffery*, 3 B. & A. 462.

(p) *Supra*, tit. *Nuisance*, 989.

(q) *Cox v. Matthews*, 1 Vent. 237. 239.

(r) *Supra*, 1217. The uninterrupted enjoyment of lights for twenty years is not evidence of a grant by a rector; for he had no power to make such a grant. *Barker v. Richardson*, 4 B. & A. 579.

(s) *Palmer v. Fletcher*, 1 Lev. 122. [1 Keb. 553. T. Ray. 87. 1 Sid. 167. 227.]

tator after the making of the will sells it, such sale does not amount to a revocation in law so as to prevent the probate of the will. *McRai v. Clark*, 2 Taylor, 278. And in Pennsylvania, it seems that a testator may devise land of which he has been disseized. *Humes v. McFurlane*, 4 Serg. & Rawle, 435.]

another purchaser who had built his house according to the plan (t); for the lots were sold under an implied condition that nothing should be done by which the windows for which spaces were then left might be obstructed (u) (1).

PART
IV.

Case for obstructing
lights.

* WITNESS.

* 1720

UNDER this head, concerning which some remarks have already been made, it may be considered,

- 1st. *The mode of enforcing his attendance in civil and criminal cases, and his production of writings in his possession. The incidents to his attendance and default (a).*
- 2dly. *Objections in exclusion of his testimony (b).*
- 3dly. *The mode of examination in chief (c), cross-examination (d), and re-examination (e).*
- 4thly. *The mode of rebutting his testimony (f).*
- 5thly. *The mode of confirming his testimony (g).*
- 6thly. *The proof in dispensation of his attendance to warrant secondary evidence (h).*
- 7thly. *His depositions, examination on interrogatories, &c. (i).*

1st. *The mode of enforcing his attendance in civil and criminal cases, and also of enforcing his production of writings in his possession, and the incidents to his attendance or default.*

1st. His attendance upon the trial is enforced by *subpœna* or *habeas corpus* in civil as well as criminal cases, and also in the latter by means of his recognizance.

By service of a writ of *subpœna*, with a tender of the witness's expenses (k).—In criminal cases, where *Subpœna*,

(t) *Compton v. Richards*, 1 Price, 27.

(u) *Ibid.*

(a) 1720.

(d) 1739.

(g) 1757.

(b) 1728.

(e) 1750.

(h) 1758.

(c) 1735.

(f) 1753.

(i) 1759.

(k) As to the mode of proceeding upon this writ, *vide supra*, P. II. p. 109. Under the stat. 1 Jac. 1. c. 15, it is not necessary, upon summoning a witness to attend before commissioners of bankrupts, that his expenses should have been tendered (*Battye v.*

(1) [See *Story v. Odin*, 12 Mass. Rep. 159. Yelv. 216. a. note (1). Observations of Gould, J. in *Ingraham v. Hutchinson*, 2 Conn. Rep. 597. *Chandler v. Thompson*, 3 Camp. 80, and Mr. Howe's note.]

PART
IV.Habeas
corpus.Subpoena
duces tecum.

* the witness resides beyond the jurisdiction of the Court, a *subpoena* may be issued from the Crown-office (*l*).

By *habeas corpus ad testificandum* (*m*).—The Court of Common Pleas refused to grant an order to commit a prisoner to the custody of the warden of the Fleet, who had been charged in custody of the sheriff upon an extent, and brought up on a *habeas corpus* for the purpose of being examined as a witness in a civil suit (*n*).

Where an instrument is in the hands of a third person, the production is compelled by means of a writ of *subpoena duces tecum* (*o*).

By this writ the witness is compellable, it seems, to produce all documents in his possession, unless he have a lawful or reasonable excuse to the contrary (*p*). * Of the validity of the excuse the Court, and not the witness, is to judge (*q*). As every man is, in furtherance of justice, bound to disclose all the facts within his knowledge which do not tend to his crimination, upon the very same principle he is also bound to produce such documents as are essential to the discovery of truth, and the great ends of justice. But as he is protected from answering questions the an-

Gresley, 8 East, 319); and therefore a warrant issued by the commissioners on account of the non-attendance of a witness without lawful impediment, and authorizing his arrest, is legal. *Ibid*. And in an action by the party so arrested, it lies on him to prove a lawful excuse. *Ibid*.

(*l*) *R. v. Ring*, 8 T. R. 585.

(*m*) *Supra*, P. II. 113.

(*n*) *Leigh v. Sherry*, 2 Moore, 33. [8 Taunt. 148. S. C.]

(*o*) From the entries cited in the case of *Amey v. Long* (9 East, 473), it appears that this writ has in fact been used from the time of Charles the second; but so necessary is the power of compelling the production of documents in the possession of third persons, that the means of doing it must have been coeval with the courts of law.

(*p*) Where it was held that an action lay against a sheriff's bailiff for not producing a warrant under which he acted in obedience to a writ of *subpoena* in a former action, in consequence of which the plaintiff was nonsuited; and it was held that his ability to produce the warrant, and his want of just excuse for not producing it, are sufficiently alleged by stating that he could and might, in obedience to the said writ of *subpoena*, have produced at the trial the said warrant, and that he had no lawful or reasonable excuse or impediment to the contrary (*Amey v. Long*, 9 East, 473). An attorney in possession of a deed to which he is an attesting witness, and on which he has a lien, will not be compelled by the Court to produce it; the mode of proceeding is by writ of *subpoena duces tecum*, as in any other case. *Buske v. Lewis*, 6 Mad. 29.

(*q*) *Ibid*.

swers to which may subject him in penal responsibility, so he is not compellable to produce any document in his possession, where the production would be attended with similar consequences (r).

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IV.

Subpœna
duces tecum.

There seems however, in one respect, to be a distinction between compelling a witness to answer a question orally, and obliging him to produce a written document. He must answer questions, although the answer may render him civilly responsible; but it seems that he is not compellable to produce title-deeds, or any other documents which belong to him, where the production might prejudice his civil rights. And this is, as it seems, a rule of legal policy founded upon a consideration of the great inconvenience and mischief to individuals which might and would result to them from compelling them to disclose their titles, by the production of their title-deeds, or other private documents (s).

(r) See *Whitaker v. Izod*, 2 Taunt. 115. In *R. v. Dixon* (3 Burr. 1687), an attorney had been served with a *subpœna duces tecum* to produce certain vouchers which his client, Mr. Peach, had produced and relied upon before a master in Chancery, in order to form a prosecution for forgery against his client, and it was held that he was not bound to produce them. [See Vol. II. 399, note (1).]

(s) In general, a plaintiff has no right to the production of a deed not connected with his own title, and which gives title to the defendant (*Sampson v. Swettenham*, 5 Madd. 16); and the Court will not compel an inspection where the parties have an adverse interest. *Threlfall v. Webster*, 1 Bing. 161.

In *Miles v. Dawson*, 1 Esp. C. 405 [and see Mr. Day's note], which was an action of trespass for seizing the plaintiff's ship, Lord Kenyon, in analogy to the practice of the Court of Chancery, would not compel a witness (who was called to prove that he had seized the ship under a written authority from the defendant) to produce the power of attorney under which he had acted.

In *Bateson v. Hartsinke*, 4 Esp. C. 43, in an action on a bill of exchange, where one of the defendants pleaded his bankruptcy and certificate, and the plaintiff sought to impeach the certificate, Lord Kenyon held that the solicitor under the commission was not bound to produce the proceedings; they were not his papers, but those of his clients.

In the case of *James Laing v. Barclay*, 3 Starkie's C. 38, Abbott, C. J. held that the solicitor to the assignees under a commission of bankruptcy against George Laing, and who had been served with a *subpœna duces tecum* by the plaintiff to produce the proceedings under the commission, was justified in refusing to produce them, an action being then pending against the same defendants, in which his clients were plaintiffs.

In the case of *Harris v. Hill*, 3 Starkie's C. 140, his lordship also ruled that a solicitor to the Manchester Water-works Company was not bound to produce a deed of composition between the

PART
IV.

* 1724
Writings to be
produced
where the
production
will not pre-
judice.

* The same principle applies where the document is in the hands of an attorney; he will not be compelled * to produce it to be read, where the disclosure would be prejudicial to his client (t).

Where these objections do not apply, it seems that the writings in a man's possession are as much liable to the calls of justice, as the faculties of his speech and memory are. There can be no difference in principle between obliging a man to state his knowledge of a fact, and compelling him to produce a written entry in his possession which proves the same fact. Not only a man's estate, but even his liberty or life, may depend upon written evidence, which is the exclusive property of a stranger (u).

company and their creditors, the production of which would, he apprehended, be prejudicial to his clients.

Where a defendant had worked coal-miles without interruption, under a special agreement, and on an action on the agreement, the defendant called a trustee who had been served with a *subpoena duces tecum* to produce the deeds under which he held the legal estate, in order to show that the plaintiff had no longer any legal title, Richards, C. B. held that he could not be compelled to produce them. *Roberts v. Simpson*, 2 Starkie's C. 203.

And in general the Court will not in any case compel a party to produce his title-deeds, where the production can occasion any prejudice to him; *Pickering v. Noyes*, 1 B. & C. 262; and the Court will not make an order for the production of deeds but where they have been deposited with the holder as a trustee for others only, or as a trustee for others jointly with himself; *Ibid.* Where the Court observed that parties are never compelled to produce their title deeds: That if a *subpoena duces tecum* be served, the party must bring his deeds; but that if he state that they are his title deeds, no Judge will compel him to produce them.

As between two persons admitting themselves to be tenants in common, a Court of equity will order the production of the title deeds of either for the inspection of the other. *Lambert v. Rogers*, 2 Meriv. 489.

But a mortgagee has no right to disclose the title of his mortgagor, and therefore the Court will not compel a tenant in common, who has sold his interest, and who is a mere mortgagee, to produce his title deeds. *Ibid.*

An heir at law cannot support a bill for title deeds, unless he show that they are essential to enable him to recover at law. *Jones v. Jones*, 3 Mer. 172. See *Lady Shaftesbury v. Arrowsmith*, 4 Ves. 66.

(t) *Copeland v. Watts*, 1 Starkie's C. 95. If, however, the client would have been compelled to produce the document, it seems that the agent would also be compellable to do so, otherwise by parting with the possession, he might exclude the party from the benefit of the evidence.

(u) As for instance, where a man's title depends upon the precise time of his birth, and the executor of an accoucheur is

It is, in all cases, the duty of the witness to bring the document with him, according to the exigency of the writ; and it a question of law for the Court, whether, upon principles of justice and equity, the production of the instrument ought to be enforced (x).

* Disobedience of the writ by the witness will not warrant the reception of parol evidence; but where the witness, in fraud of the subpoena, transferred the document to the adverse party in the cause, it was held that parol evidence was admissible (y). * 1725 Notice to produce a deed.

Where insufficient notice has been given to the attorney of a party to produce the deed, the attorney is not bound to produce it, although he has the deed in his pocket at the trial (z).

in possession of an entry made by the latter which would be legal evidence to prove the time of birth. *Supra*, P. II. p. 318. In a criminal case, proof that the prisoner at a particular time and place signed an instrument, may be decisive as to his innocence.

(x) In the case of *Copeland v. Watts* (1 Starkie's C. 95), which was an action by the lessor for breach of covenants in the lease, the plaintiff, to prove the execution of the counterpart, which was missing, called upon the solicitor of a sub-lessee to produce an under-lease by the lessee of the same premises in which the original lease was recited. The solicitor demurred to the production, conceiving it to be doubtful whether the interest of his client might not be prejudiced by the production of the under-lease. But Gibbs, C. J., after inspecting the under-lease, was of opinion that the reading of it would not prejudice the sub-lessee, and it was accordingly read.

See also *Corsen v. Dubois* (1 Holt's C. 239), which was an action on a bill of exchange, to which the defendant pleaded his bankruptcy and certificate. In order to defeat the certificate, the plaintiff called on the defendant's solicitor to produce the proceedings under the first of two commissions against the defendant, which had been left in his custody by the assignees under the first commission. The solicitor demurred to the production; and Gibbs, C. J. said, that if the production were likely to be prejudicial to the assignees, he would intercept them; but as he could not see any prejudice to the persons who had intrusted the solicitor with the proceedings, he could not withhold them, even although the documents might have been procured by other means (*Ibid.*). In the case of *Pearson v. Fletcher*, (5 Esp. C. 90,) which was somewhat similar to that of *Corsen v. Dubois*, Lord Ellenborough ruled that the solicitor to the commission was bound by public duty to produce the proceedings.

In the case of *Reed v. James*, (1 Starkie's C. 132), Lord Ellenborough said, that the witness, who was the petitioning creditor, could not in an action by the assignees with propriety refuse to produce the promissory note on which the debt was founded.

(y) *Leeds v. Cook & ux.*, 4 Esp. C. 256.

(z) *Doe d. Wartney v. Grey*, 1 Starkie's C. 283.

PART
IV.

*** 1726**
Attendance.
Incidents.

As a witness is bound to attend in Court in obedience to the writ, so is he under an obligation to be sworn and give evidence on his appearance.

If a witness for the Crown refuse to be sworn, he * is guilty of a contempt of Court, and may be fined, and committed till he has paid the fine (a) (1).

A clerk to the commissioners of taxes is bound, when subpoenaed, to produce his books, and answer all questions relevant to the issue, notwithstanding his oath of office (b).

Protection.

A witness is protected by the law in his attendance *cundo morando et redeundo* (c). Where a party being summoned to attend an arbitrator at Plymouth, and to produce his books, &c. left London for that purpose, and stopped at Clifton to procure papers left there in the custody of his wife, and remained there for two days, employed with the professional person who accompanied him in examining, assorting and arranging them, and was arrested before he had finished, the Court held that he was protected (d) (2).

This protection does not extend to one who has absconded from his bail, for it is not an arrest, but a mere re-taking of a prisoner who has escaped (e); * nor to a witness taken by his bail to be surrendered (f).

(a) *Lord Preston's case*, 1 Salk. 278; Vin. Ab. Y. Lord Preston was committed by the Court of Quarter Sessions for refusing to be sworn before the Grand Jury on an indictment for high treason. But a witness may refuse to be sworn in a civil case, if his expenses have not been paid.

(b) *Lee v. Birrell*, 3 Camp. 337.

(c) *Supra*, P. II. 119. So is a plaintiff in attending the execution of a writ of inquiry (*Walters v. Rees*, 4 Moore, 34); but the undersheriff is not bound to notice his privilege. (*Ibid.*) The Court alone can discharge him. [See *Brookes v. Chesley*, 4 Har. & M'Hen. 295.] Where the writ of inquiry issued from the Common Pleas, and the process on which he was arrested out of the Exchequer, it was held that either Court might discharge him. *Ibid.* See *Walker v. Webb*, 3 Anst. 941; *Cameron v. Lightfoot*, 2 Bl. Rep. 1190; *Tarleton v. Fisher*, Doug. 671.

(d) *Ricketts v. Gurney*, in the Exchequer, 7 Price, 699, Garrow. B. dissent.

(e) Per Richards, C. B. *Horn v. Swinford*, 1 D. & R. Rep. on Duty, &c. of Magistrates, 361.

(f) *Ex parte Lyne*, 3 Starkie's C. 132.

(1) [See *United States v. Coolidge*, 2 Gallison, 364.]

(2) [In New York, a witness attending from another State was discharged from arrest on a *capias*, without being required to file common bail. *Sanford v. Chase*, 3 Cowen, 381. See Vol. I. 119. note (1).]

PART
IV.

Where a witness neglects to attend in obedience to the writ of *subpoena*, the course of proceeding against him is either by attachment (*g*), or by action (*h*) (1).

Incidents to
default.
Action for
expenses.

A witness in a civil case may refuse to be sworn, unless his expenses have been paid or tendered. And he may maintain an action for his expenses, although he has refused to give evidence at the trial because they have not been paid (*i*), or, as it seems, although * the cause has not been called on (*k*); but he cannot recover for loss of time even upon an express *assumpsit* (*l*).

* 1728

A witness who has been summoned before commissioners

(*g*) The Court will not grant an attachment, unless a clear case of contempt be made out. An attachment has been refused where the whole of the expenses of the journey, and of the necessary stay at the place of trial, were not tendered at the time of serving the *subpoena*. *Fuller v. Prentice*, 1 H. B. 49. So where the witness living at the distance of thirty-four miles from the assize town, the expenses were not tendered to him till the evening before the trial. *Horne v. Smith*, 6 Taunt. 9. S. C. 1 Marsh. 410. So where the witness, in the course of the third day's attendance, left the Court to attend to urgent business of his trade, although the consequence was a nonsuit, no notice having been given him, when the *subpoena* was served, when the trial would come on; *Blandford v. De Tastet*, 5 Taunt. 260, S. C. 1 Marsh. 42; even although the witness was induced to leave Court by the representations of the defendant's attorney.

A witness is guilty of a contempt of Court in not attending at the assizes under a *subpoena*, although the cause be not called on. *Barrow v. Humphreys*, 3 B. & A. 598, P. C. doubting the case of *Bland v. Swafford*, Peake's C. 60.

The affidavit to found an attachment in the C. P. must state that the witness was duly called at the trial. *Malcolm v. Ray*, 3 Moore, 222. It seems that the name of the witness, inserted in the copy of the *subpoena* at the time of service, may be inserted in the original writ of *subpoena* when the witness is called. *Wakefield v. Gall*, Holt's C. 526, Cor. Gibbs, C. J.

(*h*) It has been said that no action lies unless the cause were called on, and the Jury sworn. *Bland v. Swafford*, Peake's C. 60. But *qu.* and see the observations of the Court in the case of *Barrow v. Humphreys*, 3 B. & A. 598.

(*i*) *Hallett v. Mears*, 13 East, 15.

(*k*) *Barrow v. Humphreys*, 3 B. & A. 598, doubting *Bland v. Swafford*, Peake's C. 60. See *Hallett v. Mears*, 13 East, 15.

(*l*) *Willis v. Peckham*, 1 B. & B. 515. Unless he be an attorney, or medical practitioner. *Supra*, P. II. p. 111. *Willis v. Peckham*, 1 B. & B. 515. But expenses of subsistence to a seafaring man, though an Englishman, have been allowed. *Berry v. Pratt*, 1 B. & C. 276. The expenses of making scientific experiments with a view to evidence are not allowable. *Severn v. Olive*, 3 B. & B. 72.

(1) [See Vol. I. 109, note (*g*) 112, note (1).]

PART
IV.Objection to
competency.

of a bankrupt may recover the expenses allowed by the commissioners, although he was a creditor, and the allowance was by parol (n).

2dly. In general any one may be examined as a witness who has understanding and memory, and is capable of being bound by an oath (o).

But a person of sufficient discretion to be a witness may be generally disqualified by want of religious belief (p), or by infamy of character (q). He may be specially disqualified in respect of the particular cause from being a party in the cause (r), or from the interest under which he labours (s).

An interest to disqualify must, it has been seen, be either an interest in the result of the cause, or of an interest in the record as an instrument of evidence (t). It may further be observed, that it must be an interest in the *result*, as opposed to an interest in the particular *question* proposed to the witness. If the witness be interested in the immediate result of the cause, it is * obvious that he is interested in every answer which he gives which *tends* to that result, and therefore is incompetent to answer any question in favour of the party who calls him. If he be interested either in the immediate result, or in the record, he is incompetent to answer any question in favour of the party who calls him, whether he be or be not interested in the particular question; for being interested in the *result*, he is interested in every answer which in any way tends to that result. And therefore, in such cases, the nature of the particular question put to him is perfectly immaterial.

It is now clearly established, that no interest in any disputed question will render a witness incompetent who is not interested in the particular result, or in the record (u). And therefore an underwriter of a policy is a competent witness for another underwriter in an action on the same

(n) *Yarker v. Botham*, 1 Esp. C. 65. Under the stat. 1 Jac. 1. c. 15, s. 10.

(o) *Supra*, 392, 3, 4. [and notes.]

(p) *Supra*, P. I. p. 80; B. N. P. 292. So if he be excommunicated. *Ibid*.

(q) *Supra*, 714. [& seq. and notes.]

(r) *Supra*, tit. *Parties*.

(s) *Supra*, tit. *Interest*.

(t) *Supra*, 744.

(u) *Jordaine v. Lashbrooke*, 7 T. R. 601; *Smith v. Prager*, 7 T. R. 60; *Bent v. Baker*, 3 T. R. 27; *Abrahams v. Bunn*, 4 Burr. 2251.

* 1729

Interest in the
result.

policy, although his testimony shows that no underwriter of that policy is liable (x).

There is, however, a considerable class of cases where a witness is not, by reason of his connexion with the parties, or the subject-matter of litigation, generally incompetent; but where he may be rendered incompetent by the nature of the *particular question* agitated at the trial. This happens where the event of the cause turns upon a question which, if decided one way, would render the witness liable over to one of the parties, but where a contrary decision would protect him.

Thus, in an action on a policy of insurance on goods, the captain of the vessel has not in the abstract any interest either in the immediate result of the cause, or in the record; and if the question were merely to be, * what was the original destination of the ship, he would be a competent witness for the plaintiff, to show that he acted under his direction. But if the question turned upon a deviation, he would be incompetent to prove that he had not been guilty of a deviation; for if the plaintiff failed, he would be responsible to him for the consequences of such deviation (y), and he would then labour under an interest in the event of the suit.

In this and similar cases, it is to be observed that the incompetency does not arise from the general relation of the witness to the parties, or from a direct interest in the immediate event of the suit, or in the record, for he is competent for general purposes. It is the particular question, and the consequent liability of the witness in one event, turning upon that question, which generates the objection.

When the event of the cause depends on the question of the witness's misconduct, the case is the same, as far as regards his competency, as if the sole issue had been joined upon that question. In the above case, the witness is not incompetent on the ground that a verdict against the plaintiff would generate any new liability, for his liability exists, if at all, independently of the particular action, and the plaintiff would have been entitled to recover from him for all the consequences of his misconduct, without bringing any action on the policy; but he is incompetent because, by procuring for the plaintiff a verdict on the policy, he

(x) *Bent v. Baker*, 3 T. R. 27. In an action for damage done to the reversion, the tenant is a competent witness. *Doddington v. Hudson*, 1 Bing. 257.

(y) *De Symonds v. De la Cour*, 2 N. R. 374.

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IV.

* 1731

Liability of
witness to his
principal.

would no longer be responsible to him for the loss of the benefit of his policy. And therefore to this extent the witness has an interest in the record which would conclusively prove that the plaintiff had not been precluded by the witness's fault from recovering on the policy (1).

* And in general, where the plaintiff, in order to recover, must prove the performance of some duty or contract by a party whom he has employed, the latter is not, it seems, a competent witness for the plaintiff to prove the performance of that duty or contract; for upon failure in such proof he would be responsible to the plaintiff for the consequences of his own misconduct or breach of contract (z), or, perhaps more properly, it should be said that by means of such proof he would avert the consequence of his misconduct.

Where, however, the party so employed was the actual agent who transacted the business of the principal, he is, as has been seen, competent on the score of necessity (a); but although an agent who actually executed the business

(z) See *Rotheroe v. Elton*, Peake's C. 84; *supra*, 1184.

(a) *Supra*, 767. [& seq. and notes.] A journeyman is competent to prove the delivery of goods (*Adams v. Davis*, 3 Esp. C. 48). So where a clerk or servant has received money, he is a competent witness for the party who paid it (*Mathews v. Haydon*, 2 Esp. C. 509). And per Lord Kenyon, (*Ibid.*) it is the constant course at Nisi Prius, *ex necessitate rei*, to admit the evidence of clerks and porters who were alone privy to the receipt of money, or the delivery of goods. (And see *Theobald v. Tregott*, 11 Mod. 261.) So a book-keeper is a good witness without a release (*Spencer v. Goulding*, Peake's C. 129.) And where a carrier who was directed to deliver money to A., delivered it by mistake to B., it was held, that in an action by the employer against B. to recover the money, he was competent without a release (*Barker v. Macrae*, 3 Camp. 144; B. N. P. 289. And see *Ilderton v. Atkinson*, 7 T. R. 480; *Evans v. Williams*, 7 T. R. 481, n.; *supra*, 1649.) But a debtor to the plaintiff is not competent to prove that he paid the debt to the defendant, the servant of the plaintiff, for his master (*Theobald v. Tregott*, 11 Mod. 261, Cor. Holt, C. J.), for he swears in his own discharge.

(1) [Where a witness stated in the course of his examination, that he had been sent by the plaintiff, in whose service he was, with goods to the defendant, and received orders to bring them back unless the money was paid, but that the defendant obtained possession of the goods by stratagem, and refused to pay for them unless he would receive a note of A. B. in payment—it was held that as it appeared from the whole of his evidence that he did not voluntarily surrender the possession of the goods, and was therefore not liable to an action by the plaintiff for a breach of orders, his competency was not affected. *Wilmarth & al. v. Mountford & al.*, 8 Serg. & Rawle, 124.]

of his principal is, it seems, in all cases competent to prove that he acted according to the directions of his principal (b), on the ground of * necessity, and because the principal can never maintain an action against his agent for acting according to his own directions, whatever may be the result of the cause (c), yet if the cause depend upon the question whether the agent has been guilty of some tortious act, or some negligence in the course of executing the orders of the principal, and in respect of which he would be liable over to the principal if he failed in the action, the agent is not competent without a release (d).

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principal.

(b) See preceding note.

(c) See the observations of Mansfield, C. J. in *De Symonds v. De la Cour*, 2 N. R. 374.

(d) *Supra*, 767. See *Rotheroe v. Elton*, Peake's C. 84; *supra*, 1184. In *Miller v. Falconer* (1 Camp. 251), on an action on the case for negligence in running against the plaintiff's cart with a dray, the servant who drove the cart was held to be incompetent as a witness for the plaintiff without a release.

In *Moorish v. Foote* (2 Moore, 508; 8 Taunt. 454), in an action for negligently driving a mail-coach against the plaintiff's waggon, the plaintiff's waggoner was held to be incompetent without a release, although he swore that he left sufficient room for the defendant's mail, and although the Jury found by their verdict that he was not to blame.

In the case of *Cuthbert v. Gostling* (3 Camp. 515), issue was taken on a replication of excess, to a plea of license in trespass for breaking a wall of the plaintiff's house. The trespasses complained of had been committed in repairing the defendant's house. The defence was, that the plaintiff having given leave to do what was necessary for repairing, nothing more than was necessary had been done; and to prove this, the evidence of the workmen employed was admitted on behalf of the defendant; Lord Ellenborough observing, that it by no means followed that the witnesses would be liable to the defendant if the plaintiff had a verdict; and that the case was very different from an action for negligence in driving against carriages, or running down ships, for there, if the master be liable to the plaintiff, the servants are necessarily liable to the master, and they have a direct interest to defeat the action. Here, it is to be remarked, that there was no evidence to show that the agents had done any thing beyond the scope of the master's direction, and consequently it did not appear, that in the event of a recovery against him, he would be entitled to recover over from them.

The case of a witness called for the defendant, in an action for the negligence of the witness, differs from that of a witness who, having the care of the plaintiff's carriage, is called to prove negligence on the part of the defendant, in this respect; in the former case a verdict and judgment for the plaintiff create a liability on the part of the witness which did not previously exist, and he is therefore interested in the record, which, in the event of a verdict for the plaintiff, would establish the measure of his liability, and he is consequently incompetent to prove any part of the defendant's

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IV.

On Appeal.

Separate examination of witnesses.

Objection, when, &c.

Want of religious belief.

* Unless there be some legislative provision to the contrary, it is no objection that a witness called to support the appellant's case before a court of appeal was not examined before the original court (e), even although the party who obtained the conviction is liable to double costs on a reversal of the conviction (f).

It is usual for the Court, at the instance of either party, in criminal as well as civil cases, to order the witnesses to withdraw from the Court, in order that each may be examined separately; and if any witness infringe the order by remaining in Court, he cannot afterwards be examined (g), although he be the attorney in the cause (h).

* 1734

* It has been seen, that an objection to the competency of a witness may be taken in any stage of the proceeding (i); but this, it seems, is to be understood of those cases only where the objection could not have been taken in the first instance (k).

Where the incompetency of a witness appeared on the face of his answers to interrogatories, it was held that the objection was waved by putting cross-interrogatories, and could not be insisted on at the trial (l).

The most correct and proper time for asking a witness whether the form in which the oath is about to be admi-

case. On the contrary, the liability of the witness in the latter case, where he has been guilty of negligence, *already exists*, and he is not, as it seems, wholly disqualified, but only on the particular question of negligence on his part.

For other illustrations of the incompetency of witnesses by reason of their liability over, *vide supra*, tit. *Vendor and Vendee*.—*Warranty*.

(e) *R. v. Commissioners of Appeals*, 3 M. & S. 133. *Breedon v. Gill*, 1 Ld. Raym. 219; S. C. 2 Salk. 555; 5 Mod. 272. The stat. 48 Geo. 3. c. 74, s. 15, upon convictions relating to malt, enacts that the same witnesses, and no other, shall be examined upon appeal. On a writ of attainr no other evidence can be given before the Grand Jury than that which was before given before the Petit Jury. But there the question is whether the Jury gave a false verdict on the evidence before them.

(f) *Ibid*.

(g) *Attorney General v. Bulpit*, 9 Price, 4. This is a general rule by the law of Scotland in all criminal prosecutions. Hume's Comm. on Crim. Law of Scotland, vol. II. 365; Burnet's Treatise, 467; Phillipp's on Ev. vol. I. 258. The same rule prevails in the Exchequer in revenue cases, as to witnesses for the defendant.

(h) *R. v. Webb*, Sarum Summ. Ass. 1819, Cor. Best, J.

(i) *Supra*, Vol. I. p. 124. *Moorish v. Foote*, 2 Moore, 508. 8 Taunt. 454.

(k) *Ibid*.

(l) *Ogle v. Paleski*, Holt's C. 485.

nistered to him is one that will be binding on his conscience, is before that oath is administered. But although a witness shall have taken the oath in the usual form without making any objection, he may nevertheless be afterwards asked whether he considers the oath he has taken to be binding on his conscience. But if the witness answer in the affirmative, that he does consider the oath which he has taken to be binding upon his conscience, he cannot then be further asked whether there be any other mode of swearing that would be more binding upon his conscience than that which has been used (*m*).

* A Jew who has never formally renounced the religion * 1735 of his ancestors, but considers himself to be a member of the established church, may be sworn on the Gospels (*n*).

Notwithstanding the *prima facie* appearance of interest on the part of the witness on the face of the record, yet it seems that his evidence ought not to be rejected without examining him on the *voir dire* as to his real situation (*o*).

3dly, Upon the examination of a witness in chief, it has Examination in chief. been seen that a counsel cannot, but in some excepted cases (*p*), ask a leading question (*q*), and * that he must * 1736

(*m*) The *Queen's case* (2 B. & B. 284). According to the opinion of the Judges, as delivered by Abbott, C. J. in answer to questions proposed by the Lords, Abbott, C. J. after delivering this opinion, added, "Speaking for myself (not meaning thereby to pledge the other Judges, though I believe their sentiments concur with my own), I conceive, that if a witness says he considers the oath as binding upon his conscience, he does in effect affirm that in taking that oath he has called God to witness that what he shall say will be the truth; and that he has imprecated the Divine vengeance upon his head if what he shall afterwards say is false; and having done that, it is perfectly unnecessary and irrelevant to ask any further questions."

(*n*) *R. v. Gilham*, 1 Esp. C. 285. A member of a religious sect which objects to the ceremony of kissing the book may be sworn without it. *Mee v. Reid*, Peake's C. 23; *Mildrone's case*, Leach's C. C. L. 459; *Colt v. Dutton*, 2 Sid. 6.

(*o*) *Bunter v. Warre*, 1 B. & C. 689. Replevin; avowry alleging a joint holding by the plaintiff, and *T. B.*, who was no party to the record, and the testimony of *T. B.* having been rejected, without any examination on the *voir dire* to enable him to explain his situation, a new trial was granted. Ibid.

(*p*) As where he is called to contradict a former witness as to the contents of a written instrument, and cannot, without suggestion,

(*q*) The objection in principle applies to those cases only where the question propounded involves an answer immediately concluding the merits of the case, and indicating to the witness an answer which will best accord with the interests of the party. See 2 Pothier by Evans, 265.

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Examination
in Chief.
Question of
Skill.

examine as to facts, and not as to the opinions or conclusions of the witness, for these are to be made by a Jury, except indeed where the conclusion is an inference of skill and judgment (*r*).

The opinion of a witness as to the effect of a clause in a policy is not admissible (*s*); neither is the opinion of a broker, whether particular facts ought to have been disclosed to the underwriter, admissible (*t*).

But in general, wherever the inference is one of skill and judgment, the opinion of experienced persons is admissible, for by such means only can the Jury be enabled to form a correct conclusion.

An engineer may be examined as to his judgment on the effect of an embankment on a harbour, as collected from experiment (*u*).

Upon the question whether a seal has been forged, the testimony of a seal-engraver as to the difference between the impression in question and a genuine one, is also admissible (*x*).

- * 1737 * So the testimony of medical men is constantly admitted with respect to the cause of disease, or of death, in order to connect them with particular acts, and as to the general sane or insane state of the mind of the patient, as collected from a number of circumstances. Such opinions are admissible in evidence, although the professional witnesses found them entirely on the facts, circumstances

tion, recollect the contents (Vol. I. p. 126; *Courteen v. Touse*, 1 Camp. 43). Where a witness was called to contradict a former witness, as to a conversation which he had denied, it was held that the terms might be suggested to him in the first instance (*Edmonds v. Walker*, Cor. Abbott, C. J. Westm. Sitt. after Mich. Term, 1820). And this seems to be the general practice. But see the observations on this subject, Phillipps's Evidence, vol. I. p. 257, 8.

It has been seen, (Part II. sec. xiv.) that leading questions may, at the discretion of the Court, be put to an unwilling witness. The situation of the witness, and the inducements under which he may labour to give an unfair account, are material considerations in this respect. A son will not be very forward in stating the misconduct of his father, of which he has been the only witness. A servant will not, in an action against the master, readily admit his own negligence. See 2 Evans's Pothier, 267.

(*r*) 4 T. R. 497.

(*s*) *Syers v. Bridge*, Dougl. 527; *supra*, 1148. But the practice under similar circumstances would be legal evidence. *Ibid*.

(*t*) *Carter v. Boehm*, 3 Burr. 1905.

(*u*) *Folkes v. Chad*, Mich. 23 G. 3, cited in *Goodtill v. Braham*, 4 T. R. 498.

(*x*) By Lord Mansfield, in *Folkes v. Chad*, cited 4 T. R. 498; & *vide supra*, tit. *Handwriting*.

and symptoms established in evidence by others, and without being personally acquainted with the facts.

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Although a witness be not bound, even upon cross-examination, to answer a question which tends to his criminality, yet upon examination in chief, he may be asked such questions, and is in no case estopped from answering them.

Estoppel of
witness.

It seems to be a general rule, that a witness is in no case legally incompetent to allege his own turpitude, or to give evidence which involves his own infamy (y), or impeaches his most solemn acts (z), unless he be rendered incompetent by a legal interest in the event of the cause, or in the record.

A witness for the Crown, on a charge of conspiracy, who admits that she has on a former occasion, at the instance of the defendant, sworn falsely to the fact which she is called to prove, is still competent (a).

In the case of *Curry v. Walter* (b), Eyre, C. J. held that it is at the opinion of a barrister, whether he will give evidence of what he stated to the Court upon making a motion. Privilege.

It has been seen, that the law, upon grounds of policy, in some instances precludes a witness from * revealing * 1738 matters of professional or political confidence (c).

Although it be an invariable rule, that a witness cannot be examined in chief as to the contents of a written document, yet documents in themselves inadmissible may be used collaterally for the purpose of aiding the memories of Examination with reference to written documents.

(y) *Supra*, 717.

(z) *Supra*, 17, 18. *Rands v. Thomas*, 5 M. & S. 244.

(a) *R. v. Teal*, 11 East, 309; & *supra*, 17, 18. *Contra, Walton v. Shelley*, 1 T. R. 296; 5 T. R. 579; 7 T. R. 601. *Tille v. Grevett*, 2 Ld. Raym. 1008.

(b) 1 Esp. C. 456.

(c) *Supra*, tit. *Confidential Communication*, 395; and Vol. I. p. 107. To the instances there adduced may be added the following:—Where a commander-in-chief directed the defendant (a major-general), with six other officers, to inquire into the conduct of the plaintiff, and to report the opinion of those officers, which was done accordingly, and the plaintiff brought an action for an alleged libel contained in that report, and the secretary of the commander-in-chief attended with the minutes of the report, the Court refused to allow it to be read (*Home v. Bentinck*, 2 B. & B. 130). So official communications between the governor and law-officer of a colony as to the state of the colony (*Wyatt v. Gore*, Holt's C. 299), or between an agent of government and a secretary of state (*Anderson v. Sir W. Hamilton*, 2 B. & B. 156, n.), are privileged.

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Examination
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documents.

witnesses (*d*). Thus a deposition formerly made by an aged witness was allowed to be read to him at the trial, in order to refresh his memory (*e*). And where a witness who had received money, and given a receipt for it, which could not be read in evidence for want of a proper stamp, had become blind, the receipt was read to him in Court for a similar purpose (*f*).

* 1739 And where the plaintiff had entered an account in writing of goods and money from time to time forwarded * to the defendant, and the defendant had by his signature at the foot of each page admitted the truth of the items, but the writing itself could not be given in evidence for want of receipt-stamps, as the cash items in each page exceeded 40s., yet it was held that the plaintiff might prove, that upon calling over each article to the defendant, he admitted the receipt, and that the witness who heard him might refresh his memory by referring to the account (*g*).

Where a witness refreshes his memory from memorandums, it is usual and reasonable that the adverse counsel should have an opportunity of inspecting them for the purpose of cross-examining the witness (*h*).

Although a witness cannot be examined as to the contents of a written document not produced, yet he may in some instances be examined as to the general result from a great number of documents too voluminous to be read in Court (*i*).

Cross-examination.

The general principles by which the cross-examination (*k*) of witnesses is regulated, the nature of the ques-

(*d*) *Rambert v. Cohen*, 4 Esp. C. 213; *supra*, 1383. So a person who has from time to time examined entries in a log-book whilst the events were fresh in his recollection, may refer to the book to refresh his memory, when examined as to a fact recorded there, and which he remembers to have seen there when he had a clear recollection of the circumstances. *Burrough v. Martin*, 2 Camp. 112. And see *Doe v. Perkins*, 3 T. R. 750; *supra*, Vol. I. 129. *Tanner v. Taylor*, cited 3 T. R. 754.

(*e*) *Vaughan v. Martin*, 1 Esp. C. 440. See *Doe v. Perkins*, 3 T. R. 749.

(*f*) *Catt v. Howard*, 3 Starkie's C. 3.

(*g*) *Jacob v. Lindsay*, 1 East, 460. *Supra*, tit. Stamp.

(*h*) Per Eyre, C. J. *Hardy's case*, 24 Howell's St. Tr. 824.

(*i*) *Meyer's Assignees v. Sefton*, 2 Starkie's C. 276; *Roberts v. Doxon*, Peake's C. 83.

(*k*) See the judicious remarks on this subject by Sir D. Evans, in his edition of Pothier, vol. 2, p. 268. In the case of *Hunter v. Kehoe* (before the King's Bench in Ireland, Mich. 1794, Ridg. 150), Lord Clonmell observed that cross-examination had gone to an unreasonable length; but he had in general permitted gentlemen to

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tions which may be put (*l*), especially with respect to collateral facts (*m*) (*1*), and the obligation of a witness to answer questions tending to his discredit (*n*), have already been adverted to.

* A mere assertion by counsel without any attempt at proof does not warrant a cross-examination as to a fact which would otherwise be irrelevant (*s*).

It has been seen that the law compels no one to answer a question where the answer will subject him to penal consequences (*o*). It may be observed further, that the principle extends not only to questions where the answer would immediately criminate the witness, but to all questions which tend collaterally to his conviction (*p*); but he is bound to answer all questions connected with the subject of inquiry, notwithstanding their tendency to render him civilly responsible, or even to disgrace him. Whether he be bound to answer mere collateral questions tending to disgrace him, though not to subject him to penal consequences, is a point upon which some observations have already been hazarded (*q*).

Cross-examination.
* 1740
Criminating questions.

go as far as they pleased, because if there was an honest case on the other side, it would do them no good.

(*l*) *Supra*, Vol. I. p. 132.

(*m*) *Supra*, Vol. I. p. 134.

(*n*) *Supra*, Vol. I. p. 137.

(*s*) *Lucas v. Novosilieski*, 1 Esp. C. 296.

(*o*) *Supra*, Part II. sec. xxii. Even an accomplice who gives evidence for the Crown, and who is bound to make a full and fair disclosure of the whole transaction, is not bound to answer as to any other offences in which he has been concerned. O. B. Sess. after Easter Term, 1821.

(*p*) *Cates v. Hardacre*, 3 Taunt. 424. In strictness, however, it is no ground of legal objection by the party in the cause, that the answer to a proposed question may place the witness in jeopardy; it is peculiarly the objection of the witness himself, who is under the protection of the law, and is always apprised of his situation by the presiding Judge. [See *Torre v. Summers*, 2 Nott & M'Cord, 267.]

(*q*) *Supra*, Vol. I. p. 138, & sequent. To the authorities there referred to may be added that of *Frost v. Holloway* (K. B. Sittings after Hil. Term, 1818), where Lord Ellenborough, C. J. compelled a witness to answer whether he had not been confined for theft in

(1) [In *Odiorne v. Winkley*, 2 Gallison, 53, it was held that a witness cannot be asked a collateral question not relevant to the matter in issue, in order to draw from him an answer which might, by other evidence, be shown to be incorrect, and the witness thereby be discredited. S. P. *The State v. Alexander*, 2 Rep. Con. Ct. 171.]

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tending to Dis-
grace, &c.

* It may again be proper to observe, that it seems to be admitted that such questions may be put to the witness, and it is of very little practical importance whether he be bound to answer them or not. Where the question is so connected with the point in issue that the witness may be contradicted by other evidence if he deny the fact, the law itself requires that the question should be put to the witness, in order to afford him an opportunity for explanation, although the answer may involve him in consequences highly penal (*r*).

It was lately held by all the Judges, not only that a question, as to an act done by the witness, the answer to which might criminate him, might be put, in order to afford a foundation for contradicting him, if he denied the fact, but even that the adverse party could not without asking the question adduce such evidence to impeach the credit of the witness (*s*).

If a witness voluntarily answer questions tending to criminate him on his examination in chief, he is bound to answer on cross-examination, however penal the consequence may be (*t*).

As to writings.

A witness cannot properly be asked upon cross-examination whether he has written such a thing; the correct course is to put the paper into his hands, and to ask him whether it be his writing. And if a witness be asked whether he has represented such a thing, the Court will direct the counsel to ask whether the representation has been made in writing or in words (*u*).

In the course of the late proceedings in the House of Lords in the *Queen's* case, Louisa Dumont, a witness * 1742 * in support of the charge, having been asked, upon cross-examination, whether she did not use certain expressions which the counsel read from a supposed letter from the witness to her sister, it was objected by the Attorney-

Reading gaol, although his lordship said he should not be compelled to say whether he was guilty or not: (See Phillipps on Evid. vol. 1, 269.) Upon the trial of *O'Coigly* and *O'Connor* (24 Howell's St. Tr. 1353), the witness having, upon a question being put which threw an imputation on him, appealed to the Court for protection in the first instance, the Court would not permit the question to be repeated.

(*r*) The *Queen's* case, 2 B. & B. 311; *infra*, 1753.

(*s*) Ibid.

(*t*) Per Dampier, J. Winch. Summ. Ass. 1815, Mann. Ind. tit. Witness, 222.

(*u*) The *Queen's* case, 2 B. & B. 286.

(*x*) By the Judges, in the *Queen's* case, 2 B. & B. 292.

general, that the letter itself ought to be put in before any use could be made of its contents.

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The following questions were in consequence proposed to the Judges: (x).

Cross-examination as to writings.

First, Whether, in the courts below, a party, on cross-examination, would be allowed to represent, in the statement of a question, the contents of a letter, and to ask the witness whether the witness wrote a letter to any person with such contents, or contents to the like effect, without having first shown to the witness the letter, and having asked that witness whether the witness wrote that letter, and his admitting that he wrote such letter?

Secondly, Whether, when a letter is produced in the courts below, the Court would allow a witness to be asked, upon showing a witness only a part of, or one or more lines of such letter, and not the whole of it, whether he wrote such part, or such one or more lines; and in case the witness shall not admit that he did or did not write the same, the witness can be examined to the contents of such letter?

The first question was answered in the negative, for the following reasons:—"The contents of every written paper are, according to the ordinary and well established rules of evidence, to be proved by the paper itself, and by that alone, if the paper be in existence. The proper course, therefore, is to ask the witness whether or no that letter is of the hand-writing of the witness? If the witness admits that it is of his or her hand-writing, the cross-examining counsel may, at his proper season, read * that letter as evidence; and when the letter is produced, then the whole of the letter is made evidence. One of the reasons for the rule requiring the production of written instruments is, in order that the Court may be possessed of the whole. If the course which is here proposed should be followed, the cross-examining counsel may put the Court in possession only of a part of the contents of the written paper; and thus the Court may never be in possession of the whole, though it may happen that the whole, if produced, may have an effect very different from that which might be produced by a statement of a part."

* 1743

To the second question, the Judges returned the following answer:—"In answer to the first part, namely, 'Whether, when a letter is produced in the courts below, the Court would allow a witness to be asked, upon showing the witness only a part, or one or more lines of such letter,

(x) *The Queen's case*, 2 B. & B. 286.

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and not the whole of it, whether he wrote such part?" the Judges are of opinion, that that question should be answered by them in the affirmative in that form; but in answer to the latter part, which is this, 'And in case the witness shall not admit that he did or did not write such part, whether he can be examined as to the contents of such letter?' the learned Judges answer in the negative, for the reason already given, namely, that the paper itself is to be produced, in order that the whole may be seen, and the one part explained by the other."

Upon the further question proposed, "Whether, when a witness is cross-examined, and upon the production of a letter to the witness under cross-examination, the witness admits that he wrote that letter, the witness can be examined in the courts below, whether he did or did not make statements such as * the counsel shall, by questions addressed to the witness, inquire are or are not made therein; or whether the letter itself must be read as the evidence to manifest that such statements are or not contained in the letter?" the Judges were of opinion, that the counsel cannot, by questions addressed to the witness, inquire whether or no such statements are contained in the letter, but that the letter itself must be read to manifest whether such statements are or are not contained in that letter. They found their opinion upon what, in their opinion, is a rule of evidence as old as any part of the common law of England, namely, that the contents of a written instrument, if it be in existence, are to be proved by that instrument itself, and not by any parol evidence.

T another part of the question, viz. "In what stage of the proceedings, according to the practice of the courts below, such letter could be required by counsel to be read, or be permitted by the court below to be read," the learned Judges answered, that according to the ordinary rule of proceedings in the courts below, the letter is to be read as the evidence of the cross-examining counsel, as part of his evidence in his turn, after he shall have opened his case: that that is the ordinary course; but that, if the counsel who is cross-examining suggests to the Court that he wishes to have the letter read immediately, in order that he may, after the contents of that letter shall have been made known to the Court, found certain questions upon the contents of that letter, which could not well or effectually be done without reading the letter itself, that becomes an accepted case in the courts below; and for the convenient administration of justice the letter is permitted to be read at the suggestion of the counsel; but consider-

ing it, however, as part of the evidence of the counsel proposing it, and subject to * all the consequences of having such letter considered as part of his evidence.

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It seems to be perfectly clear, that if it appear from the cross-examination of the witness, or from any antecedent evidence, that the writing in question has been destroyed, the objection founded on the reasons alleged by the learned Judges ceases; and as the defendant may at all events, in his turn, adduce secondary evidence of the contents, there is no objection to his proving the contents in the first instance by means of the adversary's witness.

* 1745

Cross-examination as to writings.

It is to be observed, that the opinions delivered by the learned Judges upon the preceding questions, were founded wholly on the application of the principle, that the best evidence must be adduced which the case admits of, and on the supposition that the object of the cross-examination is to establish in evidence the contents of a written document as material to the cause. Where that is the case the objection is invincible.

But it frequently happens that the cross-examination of a witness as to what he has before said or written on the subject of inquiry is material only as a test to try his memory and his credit.

As the decisions of the Judges have, according to the opinion of a cotemporary writer of great ability, left the question, whether a witness may not be cross-examined as to the contents of a written document for the purpose of impeaching his credit, still open, it may not perhaps be deemed presumptuous to offer a very few remarks upon this subject.

Upon every question of this nature two considerations arise: in the first place, whether the practice be advantageous and desirable with reference to some particular object; and if so, still whether, on the other hand, it may not be politic to exclude it, in order to avoid some inconvenience which would result from * its reception greater than * 1746 that which would accrue from its rejection.

That the permitting of such a cross-examination may frequently afford a desirable test for trying the memory and the credit of the witness, admits of little doubt. If, for example, a witness profess to give a minute and detailed account of a transaction long past, such as the particulars of a conversation, or the contents of a written document, and consequently where much depends upon the strength of his memory, it is most desirable to put that memory to the test by every fair and competent means. His inability under those circumstances to state whether

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he afterwards committed the details of the transaction to writing, or if he admit that he did so, his inability to state whether he then gave the same or a different account, or his admission that he gave a different account, without being able to explain why he did so, must necessarily operate to a greater or less extent to show the imperfection of his memory.

If a witness be called to prove the contents of a document written by another, which, it may be, he has seen but once, and that at a distant time, must it not be, of the highest importance to ascertain whether his powers of memory are sufficiently strong to enable him to swear to the contents of a document written by himself at a later period, relating to the same subject-matter? If he either deny that he has made any representation on the subject, or be unable to recollect what statement he has made, the circumstance tends to impeach the faithfulness of his memory, even to a greater extent than if the representation had been merely oral, inasmuch as the act of writing is more deliberate, and more likely to remain impressed on the memory, than a mere oral communication; and the contradiction which the witness receives from the writing

* 1747 itself is also more important * and more complete than that which results from the testimony of another, whose memory may be as liable to imperfection as that of the witness.

A cross-examination of this nature affords also no mean test for trying the integrity of the witness. An insincere witness, who is not aware that his adversary has it in his power to contradict him, will frequently deny having made declarations, and used expressions which he is, on cross-examination, ultimately forced to avow; and it often happens, that by his palpable and disingenuous attempts to conceal the truth, he betrays his real character; and thus his denials, his manner and conduct, become of far greater importance, and much more strongly impeach his credit, than the answer itself does which he is at last reluctantly constrained to give.

Where the party is confined to the mere production and reading of the paper, without previous cross-examination, all inferences of this nature are obviously excluded, and the opportunity of contradicting him by the production of the document in opposition to his statement on oath, cannot occur.

These observations apply even although the writing containing the contradiction be in the possession of the party who cross-examines; but it may frequently happen that the document may have been lost, but that proof of the loss,

and of the contents of the document, are in the power of the party cross-examining.

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In such a case, if the rule were strictly adhered to, a dilemma would occur, the effect of which might be to exclude the contradicting evidence altogether. The adverse party would not be able to go into evidence of the contradictory document before he had, upon cross-examination, given an opportunity of explanation to the witness, and he could not, according to the rule, examine the contents of the writing before * he had proved the contents. At all events he would labour under a difficulty in securing the attendance of an adverse witness until such time as he had established the necessary proof (x).

Cross-examination as to writings.

* 1748

Such a cross-examination would also frequently afford a test of credit where the writing could not be produced, or its loss proved; for if the witness has in fact made statements in writing which, if produced, would impeach his credit, and either out of regard to * his oath, or for fear of consequences, be induced to ad-

* 1749

(x) It has been suggested, that for the purpose of warranting the cross-examination of a witness as to the contents of a writing which has in fact been destroyed, it is fit that the party proposing to cross-examine should be allowed to interpose evidence out of his turn to prove the fact of destruction, or, that if any inconvenience should result from pursuing this course, the Court should, in the exercise of its discretion, either admit the witness's statement in the first instance, or defer the cross-examination until the adversary shall have entered on his case. Without presuming to anticipate what course the Court might in its discretion adopt when the case occurred, it may be observed, that either to allow a party to break in upon the adversary's case by adducing proof to sanction the admission of secondary evidence, or to allow him to enter upon secondary evidence, as it were, *de bene esse*, and subject to be established or defeated by the subsequent proof or failure of proof, would be going farther than any existing precedent seems to warrant. It has, indeed, been not unusual, after proof of a document by a witness under cross-examination, for the party cross-examining to have it read in that stage of the proceeding, by way of anticipation, as part of his own evidence; but there the proof is complete, and nothing remains but to read the instrument. On the contrary, in the case proposed, the proof is incomplete, and the party may with much more reason object to the admitting of secondary evidence, which may in the result turn out to have been wholly inadmissible, nay, which perhaps his opponent might render inadmissible, if it served his purpose, by afterwards omitting to support it by legal evidence.*

* It has been frequently ruled, that a defendant having given the plaintiff notice to produce writings in his possession, cannot cross-examine the plaintiff's witnesses as to their contents. *Graham v. Dyster*, 2 Starkie's C. 23; *Sideways v. Dyson*. Ibid. 49.

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mit the fact, his answer, subject to the explanation which he may be able to give, must produce the same effect.

The objections on the score of policy are, on the contrary, of a limited nature, it being admitted on all hands that the answers given cannot be received as any evidence of the writing itself for the purposes of the cause. It is possible that the witness having written what was true, may not recollect what he has written, or, to go to the greatest extent, may, even mistakingly and from defect of memory, admit (even contrary to the truth) that he has given a description of the transaction inconsistent with his present testimony; but even this would operate as a test to try his memory, and the result would show that his recollection was imperfect: a consideration of the highest importance where the witness is called to detail conversations, or the contents of a written document; a task to which few memories are adequate.

And instances may be cited where evidence is admitted for one purpose and object to which it is applicable, although with reference to other purposes and objects to which the evidence relates, it is inadmissible and wholly inoperative. Thus in the ordinary case, where a witness is cross-examined as to oral declarations made by him, and connected with the cause, evidence is constantly offered to prove those declarations, where he denies them, not with a view to prove the truth of the declaration, but in order to impeach his credit. If, for instance, in an action for goods sold and delivered, a witness called to prove the delivery of goods were to deny that he said to *A. B.* that the defendant in fact never had the goods, it would be competent to the defendant to call *A. B.* to prove

* 1750 that the witness did in fact make that declaration, * not with a view to affect the plaintiff by making the declaration evidence of the non-delivery, (for it is no evidence of the fact,) but to impeach the credit of the witness.

Here the question is allowed for the purpose of impeaching the testimony of the witness, although it involves a fact of which the answer would be no evidence. If so, why, if the very same statement were in writing, might not the question also be allowable for the same identical and limited purpose, that is, to impeach the witness's credit, although to establish the truth of the written statement, viz. that the goods had not been delivered, it would afford no evidence whatsoever?

Again, upon the ordinary examination of a witness on the *voir dire*, he may, with a view to show that he is wholly incompetent, be examined as to the contents of a writ-

ten document not produced; and the reason is, that it is not probable that the writing which creates his incompetency would be in the possession, or within the knowledge of the adversary: a reason which would frequently apply in full force in the present instance (*y*).

If a witness be called merely to produce a document which can be proved by another, and be not sworn, he is not subject to cross-examination (*z*).

4thly. As the object of re-examining a witness is to * explain the facts stated by the witness upon cross-examination, the re-examination is of course to be confined to the subject-matter of cross-examination.

Where the witness has been cross-examined as to declarations made by him, a counsel has a right, on re-examination, to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful, and also of the motive by which the witness was induced to use those expressions; but he has no right to go farther, and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness (*a*).

Where a witness has been cross-examined as to a conversation with the adverse party in the suit, whether criminal or civil, the counsel for that party has a right to lay before the Court the whole which was said by his client in the same conversation, not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon the previous examination, provided only that it relate to the subject-matter of the suit, because it would not be just to take part of a conversation as evidence against a party, without giving him at the same time the benefit of the entire residue of what he said on the same occasion (*b*).

(*y*) It is true, that if the witness upon examination on the *voir dire* has the instrument with him, it must be produced, for the reason for dispensing with its actual production, *viz.* the difficulty of procuring it, has ceased. *Buller v. Carver*, 2 Starkie's C. 433.

But where a witness is cross-examined in relation to a writing to try his credit, the reasons for permitting such cross-examination do not cease, although the party cross-examined be in possession of that instrument.

(*z*) *Simpson v. Smith*, Nott. Summ. Ass. 1822, Cor. Holroyd, J. Phil. L. E. 260, and per Bayley, J. Lancaster Spring Ass. 1824.

(*a*) The *Queen's case*, 2 B. & B. 297.

(*b*) *Ibid.* 298.

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Re-examination.

* 1751

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tion.

* 1752

But in the *Queen's* case eleven of the Judges were of opinion, that the conversation of a witness with a third person stood upon a different footing, and was distinguishable from the case of a conversation with a party, on the following grounds, viz. "The conversation of a witness with a third person is not in itself * evidence in the suit against any party in the suit. It becomes evidence only as it may affect the character and credit of the witness, which may be affected by his antecedent declarations, and by the motive under which he made them; but when once all which had constituted the motive and inducement, and all which may show the meaning of the words and declarations, has been laid before the Court, the Court becomes possessed of all which can affect the character or credit of the witness, and all beyond this is irrelevant and incompetent (c)."

(c) Upon these grounds, eight of the Judges (Best, *J. dissente*) were of opinion, that if on the trial of an action or indictment, a witness examined on behalf of the plaintiff or prosecutor, upon cross-examination by the defendant's counsel, states that at a time specified he told *A.* that he was one of the witnesses to be examined against the defendant, and being re-examined by the plaintiff's or prosecutor's counsel, states what induced him to mention this to *A.*, the plaintiff or prosecutor's counsel cannot further re-examine the witness as to such conversation, even as far only as it relates to his being one of the witnesses.

Abbott, C. J. in delivering the opinion of the Judges, observed, "The question as proposed by the House contains these words, 'and being re-examined, had stated what induced him to mention to *A.* what he had so told him;' by which I understand that the witness had fully explained *his whole motive and inducement* to inform *A.* that he was to be one of the witnesses; and so understanding the matter, and there being *no ambiguity in the words*, 'I am to be one of the witnesses;' I think there is no distinction between the previous and subsequent parts of the conversation, and I think myself bound to answer your lordships question in the negative."

His Lordship then gave the reasons of the eight Judges for distinguishing between a conversation between the witness and a party, and one between the witness and a third person, to the effect above stated.

Best, J. was of opinion that the rule which was acknowledged to have been settled as to conversations of a party to the suit, applied with equal reason and force to the statements and conversations of a witness; and held, that if one part of the conversation of a witness has been drawn from him by cross-examination with a view of disparaging his testimony, the whole of what passed in that cross-examination ought to be admitted on re-examination. That this is justly due to the character of the witness, who is entitled, in vindication of his character, to have the entire conversation fairly and fully detailed in evidence; it was due to him also as a security against proceedings which might otherwise be insti-

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* The credit of a witness may be impeached either by cross-examination subject to the rules already mentioned, or by general evidence affecting his credit (*d*), or by evidence that he has before done or said that which is inconsistent with his evidence on the trial, or, lastly, by contrary evidence as to the facts themselves.

Credit of witness how impeached.

It is perfectly settled, on the grounds already adverted to, that the credit of a witness can be impeached by general evidence only, and not by evidence as to particular facts (*e*).

It is also a general rule, that whenever the credit of a witness is to be impeached by proof of any thing that he has said or declared, or done in relation to the cause, he is first to be asked, upon cross-examination, whether he has said or declared (*f*), or done that

tuted against him on statements partially extracted on cross-examination.

The Lord Chancellor and Lord Redesdale also differed from the majority of the Judges. As the learned Judges were pleased to guard their opinion by stating that they understood the question to assume that the witness had fully explained his whole motive and inducement to inform *A*, the decision in the particular instance thus presented to them cannot be drawn into precedent as a very general rule, inasmuch as in many instances the cotemporary statement made by the witness would be the best exposition of his real motives.

(*d*) *Supra*, Vol. I. p. 145; *De Sailly v. Morgan*, 2 Esp. C. 691; *Christian v. Coombe*, 2 Esp. C. 489.

(*e*) *Supra*, Vol. I. p. 146; *Delamotte's C.* 21 *Howell's St. Tr.* 811. *Sharp v. Scoging*, *Holt's C.* 541.

(*f*) The *Queen's* case (2 B. & B. 300), where the following questions were proposed to the Judges:—

First, If in the Courts below a witness, examined in chief on the part of the plaintiff, being asked whether he remembered a quarrel taking place between *A*. and *B*., answered that he heard of a quarrel between them, but he did not know the cause of it; and such witness was not asked, upon his cross-examination, whether he had or had not made a declaration stated in the question touching the cause of it; and in the progress of the defence, the counsel for the defendant proposed to examine a witness to prove that the other witness had made such a declaration to him touching the cause of such quarrel; according to the practice of the courts below, would such proof be received?

Secondly, If in the Courts below a witness, examined in chief on the part of the plaintiff, being asked whether he remembered a quarrel taking place between *A*. and *B*., answered that he did not remember it; and such witness was not asked, on his cross-examination, whether he had or had not made a declaration stated in the question respecting such quarrel; and in the progress of the defence, the counsel for the defendant proposed to examine a witness to prove that the other witness had made such a declaration, in or

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Impeachment
of credit.

* which is intended to be proved (1). If the witness admits the words, declaration or act, proof on the other side becomes unnecessary, and an opportunity is afforded to the witness of giving such reasons, explanations, or exculpations of his conduct, if any there be, as the circumstances may furnish; and thus the whole matter is brought before the Court at once, which is the most convenient course (g).

If the witness deny the words, declaration, or act imputed to him, then if it be not a matter collateral to the cause, witnesses may be called to contradict him (h).

So if the witness decline to answer on account of the tendency of the question to criminate him, the adverse party is still at liberty to adduce the same proof (i). And the possibility that the witness may on that ground decline to answer affords no sufficient reason for not giving him the opportunity of answering with a view to explain the circumstances, and to exculpate himself (k). And it is of

der to prove that he must remember it; according to the practice of the Courts below, would such proof be received?

The Judges answered both questions in the negative.

The following questions were afterwards proposed to the Judges:

First, Whether, according to the practice and usage of the Courts below, and according to law, when a witness in support of a prosecution has been examined in chief, and has not been asked in cross-examination as to any declarations made by him, or acts done by him, to procure persons corruptly to give evidence in support of the prosecution, it would be competent to the party accused to examine witnesses in his defence to prove such declarations or acts, without first calling back such witness examined in chief to be examined or cross-examined as to the fact whether he ever made such declarations, or did such acts?

Secondly, Whether if, on any trial in any Court below, a witness is called on the part of the plaintiff or prosecutor, and gives evidence against the defendant in such cause; and if, after the cross-examination of such witness by the defendant's counsel, they discover that the witness so examined has corrupted or endeavoured to corrupt another person to give false testimony on such cause, the counsel for such defendant may not be permitted to give evidence of such corrupt act of such witness, without calling back such witness?

(g) By the Judges, in the *Queen's case*, 2 B. & B. 313.

(h) *Ibid.* & *supra*, Vol. 1. p. 134, 135.

(i) The *Queen's case*, 2 B. & B. 314.

(k) *Ibid.*

(1) [This rule has never been adopted in Massachusetts. *Tucker v. Welch*, 17 Mass. Rep. 160. See *Stable v. Spohn*, 8 Serg. & Rawle, 317.]

great importance that this opportunity should be thus afforded, not only for the reasons already suggested, but because such explanation, if not given in the first instance, may be rendered impossible; for a witness who has been examined, and has no reason to suppose that his further attendance is requisite, often departs the Court, and may not be found or brought back until the trial be at end (l).

There is no distinction for these purposes between declarations made by the witness, and acts done by him which relate to the cause (m); in the one case * as well * 1756 as the other, an opportunity must be afforded the witness of explaining his conduct before evidence is adduced to impeach his credit by proof of the fact.

If the adverse counsel has omitted to lay such a foundation by previously interrogating the witness on the subject of those declarations, the Court will, of its own authority, call back the witness in order that the requisite previous questions may be put (n).

And even although the fact to be adduced in order to impeach the witness's testimony be not discovered until after the conclusion of the cross-examination, the rule still holds; and evidence cannot be given for the purpose of thus impeaching his testimony without previous examination of the witness, even although the witness should have departed the Court, and cannot be brought back after the discovery has been made (o).

In order to impeach the credit of a witness for a defendant upon an information for assaulting revenue officers, by proving that on an information before two magistrates against the same defendant for having smuggled goods in his possession, proof of the conviction containing the testimony of the witness is insufficient; it is necessary to prove it by the testimony of those who heard what was said (p).

The record of conviction is conclusive for the purpose for which it is intended; that is, to prove the condemnation; but it is no evidence to prove the testimony of the witnesses.

After proof in a criminal proceeding that the prosecutor has employed *A. B.*, an agent, to procure and examine witnesses in support of the charge, it is not competent to

(l) By the Judges, in the *Queen's* case, 2 B. & B. 314.

(m) The *Queen's* case, Ibid.

(n) By the Judges, in the *Queen's* case, 2 B. & B. 314.

(o) The *Queen's* case, 2 B. & B. 212.

(p) *R. v. Howe*, 1 Camp. 461, Cor. Lord Ellenborough.

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of his credit.

the defendant to examine a witness to * prove that *A. B.*, who is not examined as a witness, had offered a bribe to give evidence upon the trial, or to bring papers with him belonging to the defendant; for the mere employment of an agent for the purpose of procuring and examining witnesses is in itself an innocent, and in many cases a necessary act, and it is not to be presumed that the prosecutor directed the agent to use any unlawful means for the purpose; neither can any legitimate inference or conclusion be drawn from this fact against the credit and veracity of the witnesses who are examined; for it is not to be presumed, in the absence of all proof, that they were either parties to the illegal act, or privy to it, or to any act of the like nature (*q*).

As upon an indictment for a conspiracy it is competent to the prosecutor to prove, in the first instance, the existence of a conspiracy by general evidence, without proving participation by the defendant (*r*), so it is competent to a defendant on a criminal charge, first to prove a conspiracy to suborn witnesses for the destruction of his defence, and afterwards to affect the prosecutor by proof of his participation (*s*), provided proof of such a conspiracy would afford a legitimate ground of defence (*t*).

Credit of the
witness how
supported.

5thly. Where the character of a witness is impeached by general evidence, the party who calls him is at liberty to examine the witnesses as to the grounds of their belief; and in all cases where the credit of a witness has been attacked, whether by general evidence, or by particular questions put upon cross-examination, it seems that the party who called him is at liberty to * support his testimony by general evidence of good character (*u*). So if the character of the attesting witness to a deed or will be impeached on the ground of fraud, evidence of his general good character is admissible (*x*). But the mere contrariety between the testimonies of adverse witnesses, without any direct imputation of fraud on the part of either, sup-

* 1758

(*q*) By the Judges, in the *Queen's* case, 2 B. & B. 302.

(*r*) *Supra*, 405. 2 B. & B. 303.

(*s*) The *Queen's* case, 2 B. & B. 303. 309.

(*t*) 2 B. & B. 311. But *qu.* in what cases proof of a crime committed by a prosecutor in so conspiring can afford any legal defence to a defendant.

(*u*) See *R. v. Clarke*, 2 Starkie's C. 241.

(*x*) *Doe d. Walker v. Stephenson*, 3 Esp. C. 284; 1 Camp. 210: 4 Esp. C. 50.

plies no ground for admitting general evidence as to character (y).

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The general rule has already been noticed, that former statements made by a witness whose credit is impeached are not admissible for the purpose of confirmation (z), except in particular instances where the statement was made at a time when the witness laboured under no interest or influence to misrepresent the fact.

Confirmatory
evidence.

Where a register of baptism stated the child to be seven years of age at the time of baptism, it was held that the entry was no evidence to prove the age, on an issue to try whether the party was of age when he was arrested. But Bayley, J. expressed an opinion, that if it could have been shown that the entry had been made upon the representation of the mother, who was called as a witness for her son, in order to prove his minority, the fact would have been admissible to support her testimony upon its being impeached (a) (1).

6thly. The nature of the evidence sufficient to excuse the attendance of an instrumentary witness has already been adverted to (b). Where a bail-bond had been witnessed by the defendant's clerk, who, upon being * subpoenaed at the defendant's counting-house, said that he should not attend, and the trial had been put off twice on account of his absence, and search had been made for him at the defendant's house, and at Margate, in consequence of information received at the defendant's house that he was gone thither, without effect, and that search had continued up to the time of the trial, it was held that secondary evidence was admissible (c).

* 1759

It seems, however, that the practice of admitting secondary evidence in such cases does not extend beyond mere instrumentary witnesses. Where the plaintiff, in order to prove his possession of a house, proposed to prove receipts for taxes given by the tax-gatherer, who had attended under

(y) *Bishop of Durham v. Beaumont*, 1 Camp. 207.

(z) Vol. I. p. 147, 8.

(a) *Wihen v. Law*, 3 Starkie's C. 63.

(b) *Supra*, Part II. p. 337, 8.

(c) *Burt v. Walker*, 4 B. & A. 697.

(1) [The record of a suit between other parties is evidence on behalf of the defendant, as introductory to evidence to prove that a witness who was examined on the trial of that suit, and whose credit is impeached, gave the same evidence he had given in the last. *Foster & al. v. Shaw & al.* 7 Serg. & Rawle, 156.]

PART
IV.Witness resi-
dent abroad.Interrogatories
under stat. 13
Geo. 3.

a *subpoena* to give evidence, but had been seized with an apoplectic fit, and taken home dangerously ill before the trial came on, and it was proved that he was in *extremis*, the secondary evidence was rejected (*d*).

7thly. The practice as to the examination of witnesses resident abroad has already been adverted to (*e*).

The defendant, as well as the plaintiff, may apply for a *mandamus* to examine witnesses under the stat. 13 Geo. 3, c. 63, s. 44. (*f*).

Where the commission directed the commissioners to examine the witnesses on interrogatories, and to reduce the examinations into writing in the English language, and to swear an interpreter to interpret the depositions of such witnesses as did not understand the English language, and it appeared by the return that the depositions in the first instance were reduced into writing in the foreign language, and translated by the interpreter into English within an interval of six * weeks, it was held that the commission was well executed (*g*).

* 1760

Where *A.* the captain of an Indian country trader, contracted in India with *B.* for a crew according to the custom of the country, and *A.* arrived in England with the crew, and then made a voyage with them to the West Indies and back again, on an action being brought by one of the crew for wages due on the West India voyage, it was held, on a motion for a *mandamus* under the stat. 13 Geo. 3, c. 68, s. 44, that the cause of action did not arise in India (*h*).

Where the witnesses for a defendant indicted for a misdemeanor resided in Scotland, the Court obliged the prosecutor to consent to the examination of the witnesses before one of the Courts there (*i*).

Deposition.
Leading ques-
tion.

It has been seen, that the objection which may be taken to depositions made in a cause then pending at the trial, that the questions were leading ones, is not applicable where the adverse party might have had them expunged, but has not done so, but has allowed the evidence to be exemplified (*k*) (1).

(*d*) By Lord Ellenborough, *Harrison v. Blades*, 3 Camp. 457:

(*e*) *Supra*, Vol. I. p. 276.

(*f*) *Grillard v. Hogue*, 1 B. & B. 519; 4 Moore, 313.

(*g*) *Atkins v. Palmer*, 4 B. & A. 377.

(*h*) *Francisco v. Gilmore*, 1 B. & P. 177; *supra*, Vol. I. p. 278.

(*i*) Per Lord Mansfield, in *Mostyn v. Fabrigas*, Cowp. 174.

(*k*) *Williams v. Williams*, 4 M. & S. 497.

(1) [See *Sheeler v. Speer*, 3 Binney, 130. *Snyder v. Snyder*, 6 ib.

Where a subject-matter is likely to be litigated in future, but cannot be made the subject of immediate investigation, a bill in equity lies to perpetuate the testimony of witnesses, in order to prevent the hardship which might accrue to a party from an investigation at a remote period, when death had deprived him of his witnesses (*l*).

PART
IV.
Bill to perpetuate.

Where an old witness has been examined, it is * sometimes made part of the rule for a new trial that the Judge's note of his evidence shall be read upon the new trial (*m*).

* 1761

A bill for a commission to examine witnesses abroad in aid of a trial at law, where a present action may be brought, is demurrable, unless it aver that an action is pending (*n*).

WORK AND LABOUR.

In an action to recover for work and labour done under a special contract, the proofs are,

Special contract.

1st. *Of the Contract* (*o*);

2dly. *The performance of the work*;

3dly. *Where the plaintiff proceeds on a quantum meruit, the value.*

4thly. *Proofs in Defence.*

1st. *The Contract* (*a*).—The rule, that where the parties have made an express contract, none can be implied, has

Contract.

(*l*) See *Angell v. Angell*, 1 Sim. & St. 89. The bill will be defective unless it state that the matter in question cannot be made the subject of immediate investigation. Ibid. See also *Dew v. Clarke*, 1 Sim. & St. 114.

(*m*) *Shillitoe v. Claridge*, 2 Chitty's R. 426. [Otherwise a judge's notes of the testimony of a witness are not evidence for any purpose. *Foster & al. v. Shaw & al.*, 7 Serg. & Rawle, 156.]

(*n*) *Angell v. Angell*, 1 Sim. & St. 91. But see *Moodalay v. Morton*, 2 Dick. 652; 1 Bro. C. C. 469. Dub. *Phillips v. Carew*, 1 P. Wms. 117.

(*o*) *Supra*, 84. As to the stamp, *supra*, 78. 1362. As to the necessity of a contract in writing, see the Stat. of Frauds, sec. 4; *supra*, 592. 601.

(*a*) Where an Act of Parliament for re-building a bridge empowered justices of the peace to contract for its erection, and also directed that all actions, &c. to be prosecuted or defended in pursuance of the Act should be brought by and against the clerk of the

483. *Potter v. Leeds & al.* 1 Pick. 309. *Anon.* 2 ib. 165. *Craddock v. Craddock*, 3 Littell's Rep. 77. *Jones v. Lucas*, 1 Randolph, 268.]

PART
IV.

prevailed so long that it has become a legal axiom (*p*). Where partial deviations have been made by consent, after part execution, the contract is binding as far as it can be traced, and the plaintiff is to recover on a *quantum meruit* as to the additional work (*q*).

- * 1762 A lessor contracted to pay his tenant at a valuation for certain erections, pursuant to a plan to * be agreed upon, provided they were completed in two months, no plan was agreed upon, and after the condition had been broken, the lessor encouraged the lessee to proceed with the work, and it was held that the lessee might recover for work and labour, on an implied promise arising out of such part of the former agreement as was applicable to the work (*r*).

Indebitatus
assumpsit.

Where a specific contract is entered into as to the nature of the service and the terms of payment, and the work has been executed, the plaintiff may recover for work and labour generally, unless the terms of the agreement be of such a nature as to preclude a recovery, except upon the contract itself; as where there are particular stipulations as to the times and mode of payment, and the whole time has not elapsed. But where the work has been executed, the plaintiff may recover on the general *indebitatus* count; for where the terms of an agreement have been performed, a duty is raised for which a general *indebitatus assumpsit* will lie (*s*). And it is settled, that the plaintiff is entitled to recover on the general count where the work has been performed, although he has also declared on a special agreement, and failed in the proof (*t*).

peace; and the justices at sessions, covenanted with the builder, that the justices, or treasurer of the county, would pay him specified sums by instalments, it was held that the justices were not individually liable, and that the remedy was by action against the clerk of the peace. *Allen v. Waldegrave*, 2 Moore, 621; and see *Macbeath v. Haldimand*, 1 T. R. 172; *Unwin v. Wolseley*, *Ibid.* 674.

It is a question of fact for the Jury, whether business done by one attorney was done on the credit of another attorney, or on the credit of his principal. *Scrace v. Whittington*, 2 B. & C. 11. See *Burrell v. Jones*, 3 B. & A. 47; *Iveson v. Conington*, 1 B. & C. 160; *Hartop v. Jukes*, 2 M. & S. 438; *Hart v. White*, Holt's C. 376.

(*p*) Per Lord Kenyon, in *Cutter v. Powell*, 6 T. R. 324.

(*q*) *Robson v. Godfrey*, 1 Starkie's C. 275; *Pepper v. Burland*, Peake's C. 103; *Burn v. Miller*, 4 Taunt. 745. [*Wright v. Wright*, 1 Littell's Rep. 181. *McCormick v. Connolly*, 2 Bay, 401.]

(*r*) *Burn v. Miller*, 4 Taunt. 745. [See *Linningdale v. Livingston*, 10 Johns. 36.]

(*s*) *Gordon v. Martin*, Fitzg. 302; B. N. P. 139.

(*t*) *Harris v. Oke*, Winch. Summ. Ass. 1759, Cor. Lord Mansfield, B. N. P. 139. *Weaver v. Burrows*, 1 Str. 648; B. N. P. 139.

Where an entire contract has been entered into for * work and labour, and for materials to be supplied, the plaintiff may recover the whole, on the several general counts, for work and labour, and materials found (*u*), which are applicable to the several parts of the contract; but where the contract is to build a house, he cannot recover for materials supplied, on a count for goods sold and delivered (*x*).

Indebitatus
assumpsit.

Under the *indebitatus* count, in the absence of a special contract, the plaintiff must prove, as alleged, that he performed the work upon the defendant's request, either by proof of a contract, or by direct or presumptive evidence of a request.

In general, the request may be inferred from the defendant's acquiescence in the work which is carrying on upon his own premises, or from his voluntarily availing himself of the benefit of the plaintiff's services (*1*).

Request.

A request to a tradesman to show the house of the defendant, who intimated that he would make him a handsome present, is evidence of a contract to pay a reasonable compensation for the services of the plaintiff (*y*).

Where services are rendered upon an understanding that the remuneration is to be at the entire discretion of the employer, no action is maintainable. Thus, where a committee of persons resolved "that the services to be rendered by *W.* should be taken into consideration, and such

contra. It has been said, that if the plaintiff prove a special agreement and the work done, but not pursuant to such agreement, he shall recover on the *quantum meruit*, for otherwise he would not be able to recover at all (B. N. P. 139; Mr. *Keck's* case, Oxon. 1744, *Ibid.*) But this, it seems, must be understood of cases where the defendant, notwithstanding the defect of performance, has not rescinded the contract in toto; for performance is a condition precedent to the claim for payment. *Vide infra*, 1765; and see *Ellis v. Hamlen*, 3 Taunt. 52. [See Vol. II. 95, & seq. and notes.]

(*u*) *Cotterell v. Apsey*, 6 Taunt. 322. 1 Marsh. 581.

(*x*) *Ibid.* Gibbs, C. J. observed that the objection was a captious one.

(*y*) *Jewry v. Busk*, 5 Taunt. 302. And see *Lamb v. Bence*, 4 M. & S. 275; *infra*, 1764.

(1) [See *Farmington Academy v. Allen*, 14 Mass. Rep. 174. *Inhabitants of Roxbury v. Worcester Turnpike Corporation*, 2 Pick. 38. *Yelv.* 41. a. note (1), and cases there collected.

Indebitatus assumpsit on a *quantum meruit*, for work and labour, will lie for a free negro against a person who held him in service by constraint, claiming him as a slave. *Peter v. Steel*, 3 Yeates, 250.]

PART
IV.Indebitatus
assumpsit.
Request.

* 1764

remuneration made as should be deemed right," it was held that *W.* could not recover (a) (2).

It has been seen that the plaintiff may recover on *an express promise founded on a legal and moral obligation (b).

Where a pauper during his confinement in another parish, suffering under a fracture of his leg, was attended by the parish surgeon of that parish, with the knowledge of the overseer of his own parish, who attended him during his confinement, it was held that the overseer's not repudiating the services of the surgeon was equivalent to a request (c).

In other cases there must be some privity between the plaintiff and defendant to enable the former to maintain the action. If *A.* employ *B.* to perform certain services, and *B.* without the privity of *A.* employ *C.* to perform them, *C.* cannot recover from *A.* (d). So one who is elected and nominated to serve in parliament, but who neither proposes himself as a candidate, nor in any way interferes in the election, is not liable for the expenses of the hustings, although he afterwards takes his seat in parliament (e).

(a) *Taylor v. Brewer*, 1 M. & S. 290.

(b) *Supra*, 94; and *Wing v. Mill*, 1 B. & A. 104.

(c) *Lamb v. Bunce*, 4 M. & S. 275; *supra*, 94. [See *Dunbar v. Williams*, 10 Johns. 249. *Everts & al. v. Adams*, 12 ib. 352.]

(d) *Schmaling v. Thomlinson*, 6 Taunt. 147. 1 Marsh. 500; *Cull v. Backhouse*, 6 Taunt. 148. n. [*Pinchon v. Delaney*, 2 Yeates, 22.]

(e) *Morris v. Burdett*, 2 M. & S. 212.

(2) [Where services are rendered merely in *expectation* of a legacy, without any contract, express or implied, but relying implicitly on the testator's generosity; an action for compensation cannot be maintained against the executors. *Little v. Dawson & al.*, 4 Dallas, 111. But though services may be rendered in expectation of a legacy, yet if done at the *request* of the testator, or he promises to pay for them (whether before or after they are rendered) an action lies for compensation. *Roberts v. Swift & al.*, 1 Yeates, 209. *Snyder v. Castor*, 4 Yeates, 353.

Where a young man, at the request of his uncle, went to live with him, and the uncle promised to do by him as his own child; and he lived and worked with him more than eleven years, and his uncle said his nephew must be one of his heirs, and spoke of advancing a sum of money to purchase a farm for him, as a compensation for his services, but died without devising any thing to him, or making him any compensation; it was held that an action on an implied assumpsit would lie against the executors, for the work and labour performed for the testator by the nephew. *Jacobsen v. Ex'ors of Le Grange*, 3 Johns. 199.]

But notwithstanding an agreement between *A.* and *B.* that *B.* shall remunerate *A.*, an agreement by *C.*, a third person, to pay him, may be implied from the circumstances.

PART
IV.

Request.

A master of a ship contracts by the bill of lading with the shippers to deliver goods to their assigns, he or they paying freight for the same; if the purchaser of the goods take them, this is evidence of a new agreement by him, as the ultimate appointee of the shippers, for the purpose of delivery, to pay the freight due for the carriage (*f*).

* Where one illegally avails himself of the labour of another's servant, the latter may waive the tort, and maintain an *assumpsit* for the services; as where a man harbours and employs the apprentice of another after his desertion (*g*). * 1765

Under the general count for work and labour (and materials found, if requisite), the plaintiff may give in evidence any particular species of work and labour; as of attendance as a farrier, and for medicines administered (*h*), or as an attorney (*i*).

2dly. *Performance*.—Unless there be some express stipulation to the contrary, whenever an entire sum is to be paid for the entire work, the performance or service is a condition precedent; being one consideration, and one debt, it cannot be divided (*k*) (1). This * holds equally * 1766

(*f*) *Cock v. Taylor*, 13 East, 399, overruling the case of *Artaza v. Smallpiece*, 1 Esp. C. 23; and that of the *Theresa Bonita*, 4 Rob. Ad. R. 236.

(*g*) *Foster v. Stewart*, 3 M. & S. 191; *supra*, 1763.

(*h*) *Clark v. Mumford*, 3 Camp. 37.

(*i*) *Mecke v. Oxlade & others*, 1 N. R. 289.

(*k*) Per Lawrence, J. in *Cutter v. Powell*, 6 T. R. 326. And see

(1) [Where *A.* agreed to work for *B.* a year for \$120, but before the expiration of the year voluntarily left *B.*'s service without any fault on *B.*'s part, and against his consent, it was held that the contract was entire; that *A.* must perform the whole year's service as a condition precedent to his right to recover any thing on the contract; and that he could not renounce the contract and recover on a *quantum meruit*. *Stark v. Parker*, 2 Pick. 267. *S. P. M. Millan & al. v. Vanderlip*, 12 Johns. 165. *Jennings v. Camp*, 13 Johns. 94. *Reab v. Moor*, 19 Johns. 337. *Thorpe v. White & al.*, 13 Johns. 53. *Hoar v. Clute*, 15 Johns. 224. *Faxon v. Mansfield & trustee*, 2 Mass. Rep. 147. But where an *infant* made a similar agreement, and thus left his employer, it was held that he might nevertheless recover on a *quantum meruit* for the services performed: But if the employer is injured by the sudden termination of the contract without notice, a deduction is to be made on that account. *Moses v. Stevens*, 2 Pick. 332.]

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whether a specific price has been agreed or not. It is universally incumbent on the plaintiff to prove performance.

the observations of Lawrence and Le Blanc, *Js.* in *Baisten v. Butler*, 7 East, 484; *supra*, 643.

In *Ellis v. Hamlen*, (3 Taunt. 52), it was held that a builder who undertook a work of specified dimensions and materials, and deviated from the specification, could not recover on a *quantum valent* for the work, labour and materials.

In the case of *Cutter v. Powell* (6 T. R. 336), where the employer engaged in writing to pay a sailor the sum of thirty guineas, provided he proceeded and continued and did his duty on board for the voyage, and before the end of the voyage the sailor died, it was held that the contract was entire, and that as the service, which was a condition precedent, had not been performed, nothing could be recovered.

In the *Countess of Plymouth v. Throgmorton*, in error, (1 Salk. 65,) (which was cited by Lawrence, *J.* in the preceding case,) the defendant's testator had appointed the plaintiff to receive his rents, and promised to pay 100*l.* a year for the service, and the testator died after the plaintiff had served him for three quarters of a year, and the Court held that the contract being entire, could not be divided.

The Court, in the case of *Cutter v. Powell*, seem to have been of opinion, that if a mercantile custom to that effect could have been shown, the contract might have been treated as divisible. In that case also, Lawrence, *J.* said that a common servant, although hired in a general way, was to be considered as hired with reference to the general understanding upon the subject, that the servant shall be entitled to his wages for the time he served, though he do not continue in the service for a year.

In *R. v. Whittlebury*, (6 T. R. 467,) Lawrence, *J.* observed that nothing could be due to the servant (who was, it seems, a servant in husbandry) till the completion of the year, or the end of the service.

In *Dalton*, c. 58, (Com. Dig. *Justices of the Peace*, B. 63), it is laid down, that if a servant shall of his own accord depart from his master before his time expire, he shall not have his wages; but if he depart with the consent of his master, he shall have wages for the time he served. Com. Dig. *Justices of the Peace*, B. 68; 5 Burn's J. 183.

In *Spain v. Arnott*, (2 Starkie's C. 256), where a servant in husbandry refused to obey his master's reasonable orders, and the master told him to go about his business, and the servant left the service without offering submission, or to obey the orders, Lord Ellenborough held that the servant was not entitled to recover, and said that the year must be completed before the servant was entitled to be paid.

According to the usual practice and understanding as to the hiring of domestic servants, it seems that either master or servant may put an end to the contract by a month's notice; and therefore if the servant give such notice, and serve for the subsequent month, he would probably be considered as entitled to wages up to that time. But it seems to be clear, that if a servant were to depart the service without notice, he would not be entitled to any wages, for

In an action for making a coat which has been * returned, the plaintiff must show that it was made according to the order given (l). PART
IV.

A herald, in an action for making out the defendant's * 1767 pedigree, must adduce general evidence to show that it was made out according to the laws of heraldry (m). Performance.

In an action by one who has contracted to serve for a stipulated time as a clerk or servant, it is sufficient to show that he was ready to render his services, if called upon, although during part of the time he was not actually employed (n).

Where a clerk employed at a certain salary, payable quarterly, was discharged in the middle of a quarter, but was ready and tendered himself to serve for the remainder of the quarter, it was held that he was entitled to recover for the whole quarter (o).

Upon an *indebitatus assumpsit* to recover for the board and schooling of the defendant's son, at his request, the plaintiff is entitled to recover in respect of a quarter which has elapsed after the son was removed from the school, a quarter's notice being requisite by the terms of the contract, and no notice having been given (p).

And a servant is entitled to recover for wages, although during part of the time for which he contracted to serve he was incapacitated from actual service by sickness (q).

But in this, as well as in all other * cases, unless * the contract has been actually performed, or unless that has been done which is equivalent to performance, and the contract has not been wholly rescinded, the plaintiff is not

he would not have performed the contract, either by actual service, or by giving the usual notice for dissolving the contract; and the same principle applies where the master dismisses the servant immediately for refusing to obey his reasonable orders, or for conduct so immoral as to warrant the discharge.

(l) *Hayden v. Hayward*, 1 Camp. 180.

(m) *Townsend & another v. Neale*, 2 Camp. 191.

(n) 2 Starkie's C. 198.

(o) *Gandall v. Pontigny*, 1 Starkie's C. 198. [4 Camp. 375. S. C. and Mr. Howe's note.]

(p) *Eardley v. Price*, 2 N. R. 333. The Court observed, that the moment the son was removed without notice, the quarter's payment became due, which showed that it was due in respect of the things previously furnished.

(q) *R. v. Winterset*, Cald. 298: 4 Burn's J. 332. *R. v. Sutton*, 5 T. R. 657.

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entitled to recover on the general counts, but must declare for breach of the special contract (r).

Performance.

Where a sailor contracted to serve on a voyage from Altona to London and back again, but it was stipulated that he should not be entitled to his wages till the end of the voyage, and upon the arrival of the ship in London the captain dismissed the plaintiff, but in a few days afterwards required him to go on board again, which he refused to do; the Court held that he was not entitled to recover *pro rata*, on the ground that the contract had not been rescinded by the defendant, but remained still open (s).

Value.

3dly. Although a certain price be agreed for, yet it is incumbent on the plaintiff to show that his work was properly done according to the contract, if that be disputed, in order to prove that he is entitled to his reward; otherwise he has not performed that which he undertook to do, and the consideration fails (t), even, as it seems, although no notice has been given that his performance of the contract will be disputed (u).

Where the work has been defectively performed, it * 1769 seems to be now (x) settled that he cannot * recover beyond the amount of the benefit actually derived by the defendant from the work and materials; and it seems, that where the work is so ill executed as to be wholly inadequate to the purposes for which it was intended, the plaintiff is not entitled to recover at all (y).

But notwithstanding the universality of the position, that performance, when it is the consideration for the payment of the stipulated price, is a condition precedent, yet the conduct of the employer in adopting the contract, when, if he disputed the performance, he had it in his power to rescind it in *toto* by placing the parties in *statu*

(r) *Hulle v. Heightman*, 2 East, 145; *Weston v. Downes*, Doug. 23.

(s) *Hulle v. Heightman*, 2 East, 145.

(t) Per Le Blanc, J. in *Basten v. Butler*, 7 East, 484. *Ellis v. Hamlen*, 3 Taunt. 52, where a builder undertook a work of specified dimensions and materials, and deviated from the specification. *Supra*, 1765.

(u) *Basten v. Butler*, 7 East, 479.

(x) It was formerly the course to allow the plaintiff to recover the stipulated price, and to drive the defendant to a cross-action. See *Brown v. Davis*, cited by Lawrence, J. in *Basten v. Butler*, 7 East, 484; *supra*, 642.

(y) See *Farnsworth v. Garrard*, 1 Camp. 38; *supra*, 644. [643, note (1).]

quo, affords, as against him, a conclusive presumption that the work has been properly executed, or at all events excludes the party acquiescing from taking the objection.

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Instances to this effect have already been cited (z). The principle extends to all cases of executory contracts for works of art to be delivered in a complete state. The party receiving the work under a specific contract must abide by it, or rescind it in *toto*.

Value.

Where such a complete return and rescinding of the contract is from the nature of the case impracticable, as where the contract is to build a wall, or a house, on the premises of the employer, and the contract cannot be rescinded in *toto*, then, although the defendant has partially availed himself of the plaintiff's labour, and the materials supplied by him, and has not rescinded the contract in *toto*, yet it seems now to be settled, that if the work has been defectively performed, the plaintiff cannot recover but on a *quantum meruit* for the labour, and *quantum valebant* * for the materials, to the amount of the benefit actually derived.

* 1770

Where the defendant had ordered a number of pans to be made by the plaintiff for the manufacture of vitriol, and upon trial they were found to be wholly inadequate to the purpose for which they had been ordered, it was held, that after the defendant had found, after a reasonable trial, that the pans were wholly ineffectual, he should have given notice to the defendant to take them away, who would then have been bound to take them away; but that as the defendant had retained the pans without giving notice, he would be liable to pay as much as the pans were worth (a).

If a party who has contracted for a specific work for a stipulated price fail to execute it according to the contract, or execute it improperly, as the performance is the consideration for the payment of the price, the consideration fails; and it is competent to the employer to rescind the contract in *toto*, as far as lies in his power. But if he

Defence

(z) *Grimaldi v. White*, 4 Esp. C. 95; *supra*, 641. *Fisher v. Samuda*, 1 Camp. 190; *supra*, 641. *Groning v. Mendham*, 1 Starkie's C. 257; *supra*, 641.

(a) *Okell v. Smith*, 1 Starkie's C. 107. See also *Fisher v. Samuda*, 1 Camp. 190, where, in an action for furnishing the plaintiff with unsound beer, Lord Ellenborough said that it was the duty of the purchaser of any commodity, immediately upon discovering that it was not according to order, and unfit for the purpose for which it was intended, to return it to the vendor, or give him notice to take it back. [See *Warner v. Wheeler*, 1 Chip. Rep. 159.]

PART
IV.

Defence.

does not rescind it as soon as he discovers the defect, he is, it seems, liable to the whole price, if he might upon discovering the defect have returned the articles, and in other cases is liable to the amount of the benefit derived. Where, however, he seeks to reduce the plaintiff's claim to recover the stipulated price, on the ground of mal-performance, it is advisable, although not perhaps strictly necessary, to apprize the plaintiff of his intention, in order that he may not be taken by surprise (a).

* 1771
Negligence.

* In an action upon an attorney's bill, negligence cannot be set up as a defence, unless it has been so gross as to deprive the defendant of all possible benefit from the service (b), if it can even then.

It was held to be no defence to an action on an attorney's bill for prosecuting a suit for the defendant, that no benefit had been derived by the defendant, where the failure did not result wholly from the plaintiff's negligence, but partly from accident (c).

Where a person is employed in a work of skill, the employer buys both the judgment and labour of the other, and if the attempt fail for want of skill, the plaintiff cannot recover (d). It is otherwise where the employer substitutes his own judgment (e).

Where the demand is compounded of skill and things administered, if from want of skill no benefit is derived, the plaintiff cannot recover. Thus, to an action by an apothecary for work and labour, and medicines administered, it is a good defence to show that the plaintiff treated his patient ignorantly and improperly (f). But it would be otherwise if the medicines had been supplied according to a physician's prescriptions (g).

(a) *Vide supra*, 644.

(b) *Templer v. McLachlan*, 2 N. R. 136. This determination was previous to that of *Basten v. Butler*, 7 East, 484.

(c) *Dax v. Ward*, 1 Starkie's C. 409. See also *Pasmore v. Birnie*, 2 Starkie's C. 59.

(d) Per Bayley, J. in *Duncan v. Blundell*, 3 Starkie's C. 6, where the plaintiff had, by the defendant's order, erected a stove in the shop of the latter, and laid a tube under the floor to carry off the smoke, but the plan had entirely failed. And Bayley, J. said, that as this was a work of skill, the party who undertook it was bound to know whether it would succeed or not.

(e) *Ibid.*

(f) *Kannen v. McMullen*, Peake's C. 59, Cor. Lord Kenyon. [See *Bliss & al. v. Negus*, 8 Mass. Rep. 46.]

(g) Per Lord Kenyon, *Ibid.* [See *Spaulding v. Inhabitants of Alford*, 1 Pick. 33.]

It is a good defence to prove that the plaintiff induced the defendant to employ him by false and * fraudulent professions of his skill. An empiric who pretends to cure by sovereign medicines, and who by false representations * 1772 induces the defendant to employ him, cannot recover for medicines and attendance (*h*).

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IV.

WRIT OF INQUIRY.

THE only question upon the execution of a writ of inquiry is as to the amount of the damages; the plaintiff, therefore, need adduce no proof to establish his claim to damages, but only as to the quantum. If he sue on a bill of exchange or promissory note, proof of signatures is unnecessary; the only use in producing the instrument is to show whether the payment of any interest is indorsed upon it (*i*).

If the plaintiff give no evidence on one or more of the counts, he may afterwards sue for the causes of action contained in those counts. Where the plaintiff declared on a promissory note, and also for goods sold, but gave no evidence on the latter count, it was held that the judgment was no bar to a subsequent action for the goods sold (*k*).

The defendant can give no evidence, except in reduction of damages. Where judgment had been given against the defendant on demurrer, and proof was given that she had acknowledged the debt to a certain amount, it was held that she could not give evidence to show that she was acting merely as agent for her husband, who was abroad (*l*).

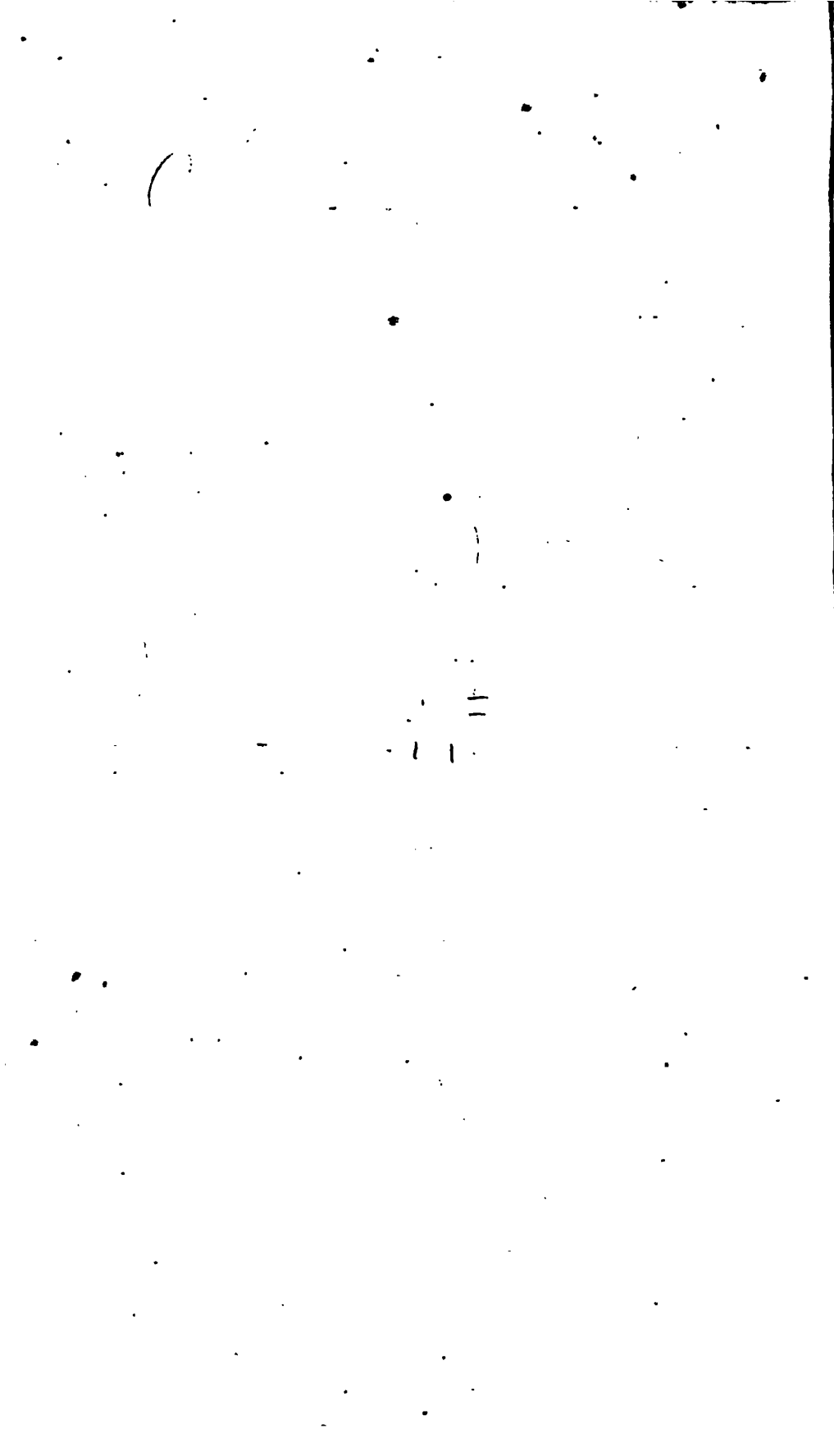
(*h*) *Hupe v. Phelps*, 2 Starkie's C. 480.

(*i*) *Bevis v. Lindsell*, 2 Str. 1149; 3 Wils. 155. *Shepherd v. Charter*, 4 T. R. 275. *Green v. Hearne*, 3 T. R. 301.

(*k*) *Seddon v. Tutop*, 6 T. R. 607. [See *Backus v. Richardson*, 5 Johns. 476.]

(*l*) *De Gaillon v. Victoire Harel L'Aigle*, 1 B. & P. 368. [S. P. *Anon.* 2 Hayw. 34. *McClenachan v. McCarty*, 1 Dallas, 377.]

THE END.



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